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No. 711.

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Supreme Court of the United States

OCTOBER TERM, 1932.

Nos. 711 and 721.

BENJAMIN F. JOHNSON,

Petitioner,

vs.

MANHATTAN RAILWAY COMPANY, *et al.*

LILLIAN BOEHM,

Petitioner,

vs.

MANHATTAN RAILWAY COMPANY, *et al.*

On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF PETITIONER BENJAMIN F. JOHNSON.

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BENJAMIN F. JOHNSON,

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF OF PETITIONER BENJAMIN F. JOHNSON.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, per L. Hand, *C. J.*, is reported in 61 Fed. (2d) 934. It also appears in the record at pages 1024-1035.

The opinion of the District Court, per Woolsey, *D. J.*, is reported in Federal Supplement, Vol. 1, issued January 9, 1933, at pages 809-820. It also appears in the record at pages 694-721.

*Statement.**

On September 21, 1932, the petitioner Benjamin F. Johnson, a citizen of Kentucky, filed in the district court, an equity bill, in his derivative right as a stockholder of Manhattan Railway Company against American Brake Shoe and Foundry Company, Interborough Rapid Transit Company, and all defendants who, at that time, were parties to the equity receivership suit entitled *American Brake Shoe and Foundry Company* against *Interborough Rapid Transit Company* (R. 13-15). The Interborough receivership had been extended to Manhattan Railway Company and a separate receiver was appointed for it (R. 196).

The complainant in the *Brake Shoe* cause was a simple contract creditor to the extent of $27,500 (R. 164). The averments in petitioner's bill and supplemental bills show that the *Brake Shoe* case was prearranged and collusive (R. 24-6, 31, 35-7, 40, 43-5, 57, 59-62, 70-4, 120). It was alleged in petitioner's bill that the *Brake Shoe* suit was brought in disregard of the effective district court rules governing equity causes; that Honorable Martin T. Manton, Senior Circuit Judge, who entertained the *Brake Shoe* bill, and appointed receivers therein, was without authority to act officially in said cause (R. 15-22); that the appointment both of the receivers, and of their solicitors, was irregular and improper, because of their past relationship to the Interborough and Manhattan companies (R. 24-6, 31, 37, 40-5, 57, 70-3, etc.); also that the two orders of Judge Manton designating himself a district judge to take charge of the

* Italics throughout this brief ours.

receiverships, under and by virtue of Sections 18 and 23 of the Judicial Code, were void, because there had been no disagreement among the eight district judges warranting his intervention (R. 17); nor was there any public as distinguished from a private interest involved warranting such intervention (R. 19). The prayer of the bill was to vacate the receivership orders, the designations, for the appointment of disinterested receivers of the properties; also for the designation of independent counsel, for determination of the rights of Manhattan Railway Company, for an accounting, etc. (R. 42-48).*

The filing of petitioner's bill was preceded by an order of September 20, 1932, made by District Judge Francis G. Caffey upon Johnson's petition granting leave to file the suit (R. 7). The jurisdiction of the district court over Johnson's cause depended upon diversity of citizenship of the parties (R. 13-15).

Johnson filed two petitions supplemental to his original bill (R. 49-66 and R. 69-79) setting forth certain additional grounds to show that it was the purpose of the parties to the *Brake Shoe* cause to have the receiverships

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* It is suggested in the opinion of the lower court that appellant's interest is limited to a change of judge and receivers; the opinion has apparently disregarded the allegations of the bill, and of the two supplemental petitions charging that the receivership proceedings were entirely void; also that as said receivers and their solicitors were appointed in a collusive proceeding they would not adequately protect the interests of petitioner, and those similarly situated. It was suggested on page 20 of the main brief filed in this Court opposing the writ, that the reason for appellant's derivative suit has disappeared. This is incorrect. The danger of having the entire equity in the stock of Manhattan Railway Company wiped out and its Second Mortgage Bonds is still very real. And while it is true, as stated at pages 20 and 21 of said brief, that the defaults in the payment of interest on Manhattan Railway Consolidated 4% Bonds have been cured, counsel failed to inform the Court that such payment was not ordered made until the day before expiration of the 60-day period of grace allowed under said mortgage before foreclosure proceedings could be instituted; and that the payment was made only after protracted hearings before a Special Master appointed for that purpose. There is at present pending an application by the receivers to be relieved from the payment of the April 1, 1933 interest on the first mortgage bonds.

in friendly hands, and asked to have vacated Judge Manton's decree of September 28, 1932,

> "continuing the receiverships *pendente lite*, and providing that the 1932 equity term of this court be extended until the termination of the proceedings under the receiverships; or, in any event, for a period of three years from September 28, 1932, with leave to apply for further extension thereof, and with reservation of full jurisdiction in the premises" (R. 64, 706-7).

A number of parties intervened in appellant's suit, including one Lillian Boehm (R. 80, 145), so that, when the cause came up for argument upon a rule to show cause before district judge John M. Woolsey on October 4, and 6, 1932, the value of the Manhattan Railway stock represented at said hearings amounted to approximately $15,000,000 (R. 830).*

Proceedings Below.

After a hearing, District Judge Woolsey holding the motion part of the court, vacated the decrees of Judge Manton in the *Brake Shoe* case. He declined to vacate the designations (which were entitled in the Circuit Court of Appeals) as beyond his jurisdiction; and postponed the appointment of substitute receivers pending the possibility of appeal (R. 698). Judge Woolsey upon his own motion directed consolidation of the appellant's cause with the *Brake Shoe* cause (R. 697, 710-711). 1 F. Supp. 809.

The United States Circuit Court of Appeals reversed the above mentioned orders.

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* In the main brief in opposition to appellant's petition for writ of certiorari, filed in this Court, by counsel for the receivers of Interborough and others, it is stated at page 20 that, at the annual meeting of the stockholders of the Manhattan Railway Company held in November 1932, the board of directors of that Company was displaced. Said statement is correct. The Manhattan Railway Company is only nominally a respondent on this appeal. It is in entire sympathy with the position of the petitioner.

This cause comes to this Court upon a writ of certiorari granted March 20, 1933 (R. 1049).

The Principal Questions Involved.

At the time receivers were appointed for the Interborough Company (August 26, 1932), the following Court Rules of the District Court were in force:

> "All applications for the appointment of receivers in equity causes * * * shall be made to the Judge assigned to hold the motion part of the business of the Court and to no other Judge" (Rule 11-a, General Rules of U. S. District Court).
>
> "Any Judge designated to sit in the District Court for the Southern District of New York shall do such work only as may be assigned to him by the Senior District Judge" (Rule 1-a, General Rules of U. S. District Court).

These rules were adopted unanimously by the district judges of the Southern District of New York and are still in effect. They have been recognized and obeyed, except in a few cases where the Senior Circuit Judge deemed it unwise to comply therewith. The Interborough receivership is one of the exceptional causes wherein, for instance, Rule 11-a was recognized as valid by Judge Manton, but declared inoperative as to him (R. 179).

It is conceded that on August 26, 1932, when the first of the receivership orders was made, District Judge Robert P. Patterson was the Judge duly assigned to hold the motion part of the business of the district court; that he was present in the court room, or in chambers, ready to receive and act upon applications for equity receiverships; and that the papers in the *Brake Shoe* case had not been presented to him (R. 717-8). The opinion of the Circuit Court of Appeals states that Judge Manton, in taking jurisdiction of the *Brake Shoe* case, and appointing receivers therein, had

no intention of being bound by the above quoted rules (R. 1028).

The plan followed by the parties to this exceedingly friendly receivership, in order to circumvent the established rules of the court, was to present to Judge Manton (1) the bill of a simple contract creditor; (2) answer of the Interborough admitting its averments; and (3) an affidavit of James L. Quackenbush, an officer of the Interborough, designated "*Affidavit Showing Necessity of Individual Receivers*" (R. 175-176). The opinion below says regarding the said affidavit:

> "On August 25, 1932, the attorney for the Interborough Rapid Transit Company verified an affidavit in a suit, not yet begun, entitled *American Brake Company* v. *Interborough Rapid Transit Company*, alleging that, in his judgment, it would be undesirable to have a trust company appointed receiver in the cause and giving his reasons" (R. 1024-5).

The only trust company Mr. Quackenbush could have had in mind was the Irving Trust Company. The only rule that requires its appointment as receiver is Bankruptcy Rule 27, *which is expressly limited to bankruptcy causes.* Judge Woolsey pointed out that there was no rule requiring the appointment of the Irving Trust Company in equity causes, saying that the District Judges were free in such cases to appoint individual receivers (R. 2518).

The opinion below says with regard to the "Affidavit Showing Necessity of Individual Receivers":

> "Whether this was acted upon by the Senior Circuit Judge for the Second Circuit does not appear in the record."

In directing the Receivers to appeal from Judge Woolsey's opinion Judge Manton wrote an opinion explaining his action (1 Fed. Supp. 820, 826-7). This plainly shows that

said affidavit was the Senior Circuit Judge's reason for invoking Sections 18 and 23 of the Judicial Code (Sec. 22 and Sec. 27, U. S. Code Tit. 28), under which he issued the two orders whereby he designated himself a district judge to take charge of the Interborough-Manhattan receiverships. Both of said designation orders were dated August 25, 1932 (R. 177, 179). District Judge Woolsey, in his opinion observed that said orders were bound together under one cover and were filed simultaneously with the bill, answer and "public interest" affidavit in the Clerk's office on August 26, 1932 (R. 175, 705, 715).

Taking the Quackenbush affidavit as a foundation, the Senior Circuit Judge first invoked Section 18 of the Judicial Code, which provides:

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, *if the public interest requires*, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit * * *
>
> During the period of service of any judge designated and assigned under this chapter, he shall have all the powers, and rights, and perform all the duties, of a judge of the district, or a justice of the court, to which he has been assigned."

and made an order to be hereafter referred to as the "public interest order" to be found in the margin.*

---

* "WHEREAS, the undersigned, as such Senior Circuit Judge, finds that the public interest requires that Martin T. Manton, a Circuit Judge of the Second Judicial Circuit, be designated and assigned as a Circuit Judge of this Judicial Circuit to hold a District Court within such Circuit, it is hereby

ORDERED, ADJUDGED and DECREED, that the said Martin T. Manton be and he hereby is designated and assigned to hold a District Court of the United States for the Southern District of New York, Second Judicial Circuit, during the period beginning August 25, 1932, and particularly to hear and determine all applications and proceedings in the matter entitled *American Brake Shoe and Foundry Company* v. *Interborough Rapid Transit Company*."

At the same time, the Senior Circuit Judge invoked Section 23 of the Judicial Code, which provides:

> *"District with more than one Judge; Division of business.* In districts having more than one district judge, *the judges may agree upon the division of business and assignment of cases for trial in said district;* but *in case they do not so agree*, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district."

and made an order to be hereafter referred to as "Division of Business Order", quoted in margin.*

Petitioner contends that both designations were unauthorized, under any proper interpretation of Sections 18 and 23 of the Judicial Code, since the conditions named or contemplated in those sections did not exist warranting their invocation; so that at the outset, we are confronted

---

* "WHEREAS, Section 23 of the Judicial Code provides that 'In Districts having more than one District Judge, the judges may agree upon a division of business and assignment of cases for trial in said District; *but in case they do not so agree, the Senior Circuit Judge of the Circuit in which the District lies shall make all necessary orders for the division of business and the assignment of cases for trial in said District*'; and

WHEREAS, Martin T. Manton, a Circuit Judge of the Second Judicial Circuit of the United States designated and assigned to hold a District Court in the Southern District of New York in said Circuit, and acting as District Judge for the Southern District of New York in this Second Judicial Circuit, does not agree upon the division of business and assignment of cases for trial in the Southern District of New York as provided in and pursuant to the rules of court for the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York; it is hereby

ORDERED, ADJUDGED and DECREED, for a period of thirty days beginning with this day, *all applications for the appointment of receivers in equity causes in the Southern District of New York may be made not only to the District Judge designated to hear such application pursuant to Rule 11-a of the General Rules of the District Court* for the Southern District of New York, but also to Martin T. Manton, Circuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York."

with the inquiry as to the Senior Circuit Judge's power to designate himself a district judge to take charge of the *Brake Shoe* case. It is our position that Judge Manton's action was *coram non judice*, and there was therefore no district court forum lawfully created in which he could act. If we are correct then, as this necessarily goes to the essence of his power to have acted in the cause, it would be unnecessary to consider the validity and force of Rule 11-a and Rule 1-a of the General Rules of the District Court.

Section 23 of J. C. (U. S. Code, Tit. 28, Sec. 27).

Section 23 of the Judicial Code cannot be deemed the source or justification of Judge's power to act, as there was no disagreement among the district judges regarding the division of business of the court (R. 717). It appears to be conceded by counsel for the respondents, because the Senior Circuit Judge misconceived or disagreed with the unanimous thought and action of the eight district court judges as to the wisdom or propriety of Rule 11-a regarding the part of the court to which an application for equity receivers should be made, that he could not by virtue of Section 23 of the Judicial Code designate himself a district judge; then report to himself as Senior Circuit Judge that he had disagreed with the other eight district judges, and upon the basis of such disagreement, direct that the application for the appointment of receivers should be made to him (R. 715). The incongruity of the argument becomes pronounced when it is considered that Section 23 contemplates that the Senior Circuit Judge is required to act as an arbiter or peacemaker to settle any disputes that might arise among the district judges in respect to the division of business.

Section 18 of J. C. (U. S. Code, Tit. 28, Sec. 22).

This leaves Section 18 of the Judicial Code as the only possible source of authority for the designation. In considering the action taken by Judge Manton thereunder, we are again faced with (a) Judge Manton's opinion reported in 1 Fed. Supp. 826-7, specifically mentioning the "public interest affidavit" as the basis for his finding that the public interest prompted him to make the designation order; (b) said affidavit, and opinion, show that the interest therein mentioned was a private interest, and not the kind of interest contemplated by the statute; for the question whether an individual receiver rather than a corporate receiver should be appointed in a particular case obviously affects the private interests of that defendant and its creditors, and is only remotely a matter of public concern; (c) that the court was not precluded from inquiring into the question of public interest in a case where the record is plain that the alleged necessity was an unjustified fear that a corporate receiver might be appointed by the regularly assigned district judge (if the papers had been presented to him), and presumably over the objection of the interested parties, where no court rule existed requiring the appointment of corporate receivers in equity causes; (d) that while Section 18 of the Judicial Code confers the right upon the Senior Circuit Judge to designate and assign a circuit judge *to hold a district court* in proper cases, it gave no right to assign the designated judge to take charge of a particular case in violation of established court rules.*

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* It occurs to us that section 18 of the Judicial Code was intended to cover emergency situations, but not to permit the Senior Circuit Judge to designate himself for the purpose of attaching himself to an immense intricate receivership, involving a large part of each day over a period of several years, to the detriment of his judicial duties. The efficient handling of these receiverships, involving, for instance, the right to abrogate the existing Manhattan lease, the millions of special deposits in excess of sinking fund requirements under the Interborough 5% Bonds,

Rules 1-a and 11-a of District Court General Rules.

If this court should hold, notwithstanding the grounds hereinabove and hereinafter urged, that a fair construction of Section 18 authorized the designation orders, then we are faced with the inquiry whether, violation of General Court Rules 1-a and 11-a (assuming, as did the court below, that the same were valid rules of law; R. 1029) go to the jurisdiction of the judge who disregards them. These rules, adopted unanimously by the eight district judges, provided, that the judges appointed to sit in the southern district of New York should attend to such judicial work as was assigned by the senior district judge (Rule 1-a); and that applications for the appointment of receivers in equity causes should be made to the judge of the court regularly assigned to the motion part (Rule 11-a). Both rules were adopted pursuant to express authority conferred by Section 23 of Judicial Code, and by Section 731, of U. S. Code. There is no law of the United States, and no rule prescribed by the Supreme Court under Section 730 of the Code, which was designed to regulate the practice of the court below on the particular matters set forth in General Rules 1-a and 11-a; nor are said rules inconsistent with any other statute or rule prescribed by this Court. Said rules are ordinarily designated calendar rules, intended as "necessary or convenient for the advancement of justice and the prevention of delays in proceedings" and of course apply exclusively to the federal court in the southern district of New York.

Entirely aside from argument that may be advanced on this appeal by counsel for respondents as to the validity and effect of the District Court Rules in question, we beg

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the preservation of the 5-cent fare on the lines in question under the contracts with the City of New York (*City of New York* v. *Interborough*, 257 N. Y. 20, 36), and many other intricate problems would take up the time of any district judge to the virtual exclusion of any other work.

leave to quote the following excerpts from the record, as showing the position of Mr. William D. Guthrie, and of Mr. Charles H. Tuttle, counsel in chief for said respondents, at the all-day session before District Judge Woolsey.

"The Court: * * * The whole question is whether these rules 1-a and 11-a * * * are a valid exercise of the District Court's rule making jurisdiction. And if they are valid, why wasn't Judge Patterson the only person who might be approached on the subject of equity receivership?

Mr. Guthrie: Why, *if they are valid, of course he ought to have been applied to. If they are valid, Judge Manton should not have presumed to do a thing without permission of Judge Knox.*" (Judge Knox is the Senior District Judge of the Court) (R. 918).

"The Court: Mr. Tuttle * * *. I have just read this case of *Galveston Dry Dock & Construction Company* in 40 Fed. (2d), and that was a case in which Judge Manton, Judge Hand and Judge Chase sat in the Second Circuit Court of Appeals, and Judge Hand wrote the opinion, and he said the rule had the force of law and that the Circuit Court of Appeals were as much bound by it and as much bound to observe it as though it were a statute.

Mr. Tuttle: *There is no question in our minds, Judge, that a rule competently passed under authority of statute has just the effect of a statute*" (R. 885).

The other determining questions raised on this appeal will be treated in argument.

Specifications of Error.

1. The Court below should have held that, as there was no disagreement among the district judges as to division of business, and as an "alleged" disagreement was the sole basis upon which Judge Manton designated himself a district judge for the purpose of assuming jurisdiction in the *Brake Shoe* case, his order appointing receivers was void.

2. The Court below should have held that, upon the facts of record, it affirmatively appeared that there was no public interest which authorized Judge Manton to designate himself a district judge to appoint receivers in the *Brake Shoe* case, and hence his acts as district judge were *coram non judice.*

3. The Court below erred in holding that Judge Manton's orders should be upheld at the least as those of a *de facto judge.*

4. The Court below should have passed upon the validity of Rules 1-a and 11-a of the General Rules of the District Court for the Southern District of New York, and should have declared such rules valid.

5. The Court below erred in holding that Rule 11-a was merely directory, and that the admitted violation thereof by Judge Manton did not constitute a jurisdictional defect rendering the appointment of receivers in the *Brake Shoe* case void.

6. The Court below erred in holding that, on the assumption that Rule 11-a was only directory, the appointment of receivers by Judge Manton in violation of said rule, could not be attacked by an independent bill, to which all of the parties in the *Brake Shoe* case were made parties defendant.

7. The Court below erred in not holding that the *Brake Shoe* case was a friendly and collusive proceeding, brought by a simple contract creditor, without the requisite standing to institute such proceeding and, should, therefore, have affirmed the order of Judge Woolsey setting aside all of the orders of Judge Manton.

8. The Court below erred in not passing upon the sufficiency of petitioner Johnson's original bill, and supplementary bills, and in failing to hold that the same stated a good cause of action cognizable in equity.

Summary of Argument.

A summary of the argument which follows is contained in the index.

ARGUMENT.

I.

The "Division of Business Order" (under Section 23 of Judicial Code) was without actual basis or justification, and was therefore ineffective and void.

As Judge Manton predicated his right to hear the application for receivers in the *Brake Shoe* case (notwithstanding the inhibition of Rule 11-a of the District Court Rules), upon Section 23 of the Judicial Code, we contend that he lacked authority to appoint receivers, unless said section justified his action.

Section 23 naturally divides itself into two parts, namely: (a) in districts having more than one *district* judge, the judges may agree upon a division of business and assignment of cases for trial in said district; and (b) in case they do not so agree, the Senior Circuit Judge shall make all necessary orders for the division of business and the assignment of causes for trial in said district.

After quoting the said section in his order, Judge Manton stated that he,

> "does not agree upon the division of business and assignment of cases for trial in the Southern District of New York heretofore adopted by the then United States District Judges for the Southern District of New York",

and therefore directed that for a period of thirty days from August 25, 1932, "all applications for the appointment of receivers in equity causes in the Southern District of New York may be made *not only to the District Judge designated to hear such applications pursuant to Rule 11-a of the General Rules of the District Court for the Southern District of New York*, but also to Martin T. Manton, Cir-

cuit Judge designated to act as District Judge to hold a District Court for the Southern District of New York".

Here there is clear recognition of the validity of Rule 11-a, except as applied to himself. Judge Manton did not question such rule as beyond the powers of the district judges to promulgate, but he merely referred to a "suppositious disagreement" among the district judges as to division of business under such rule.

(a) *It is undisputed that there was no disagreement among the judges of the district court as to the division of business and no conflict whatsoever among them. Judge Woolsey makes this entirely plain in his opinion* (R. 716-717):

> "As I have set forth above, on June 29, 1932, there was filed with the Clerk an agreement for the division of business for the past summer, signed by the eight Judges of this Court.
>
> By that agreed division, Judge Patterson was to sit in Bankruptcy and General Motions from August 15, 1932, through and including August 29, 1932.
>
> There was also filed with the Clerk, on the same day, an agreement, signed by all the judges of this Court, for the division of business for the Court year just beginning—October, 1932 to June, 1933.
>
> Accordingly, what I have called the domestic economy of this Court was wholly tranquil. There was no disagreement of any kind among the Judges as to the division of business. Therefore, the condition precedent—of disagreement among the District Judges—on which alone the Senior Circuit Judge had a right to step in and make an order of division of the business of the District Court did not exist, and Judge Manton's order of designation of business of August 25, 1932, was entirely void so far as its having any effect on the rules of this Court or the division of business in this Court."

(b) *The section intended that the Senior Circuit Judge should act as peacemaker, and not as one of the disputants.*

Simultaneously with the first order of designation, Judge Manton proceeded to declare that he found himself in disagreement with the judges as to the division of business. It would be interesting to know at what moment this disagreement arose. We submit there is no escape from the conclusion that Judge Manton was acting in a dual capacity at one and the same time; first he created himself a judge of the district court; then he declared (without anyone else knowing it) that he found himself in disagreement with the other judges as to the division of business as a judge of the district court. Query, when did he shed his cloak as a district court judge and don his robes as senior circuit judge? and then in that capacity, assume to divide the business over which he suggests that there was a dispute. The very language of the section contemplates a disinterested senior circuit judge for the purpose of settling disputes between two or more of the regularly constituted judges of the district court. It would be contrary to every principle of Anglo-Saxon jurisprudence if Judge Manton could appear as a disputant with other judges and, at the same time, act as the sole arbiter to settle such dispute. The statute obviously never intended any such result. Judge Woolsey puts the matter plainly when he says at page 716 of the record:

> "It seems to me to be perfectly clear, that normally, as a disagreement *inter sese* as to the division of business between the district judges of a district can only arise in the district court and between them, the request for aid in settling their disagreement should be initiated by them and should come from them to the Senior Circuit Judge as the third party named by Section 23 with statutory power to act in settlement of their dispute.

> If that is the normal method by which Section 23 of the Judicial Code should be invoked, there certainly would have to be a very marked case of disagreement, which amounted at least to a public scandal, to warrant a departure from that method and to justify the unasked intervention of the Senior Circuit Judge."

Section 23 can hardly be interpreted to mean, as it would have to be, in order to sustain the order of Judge Manton, that a Senior Circuit Judge can designate himself a district judge for the sole purpose of acting upon a disagreement which is brought into being between himself, as such district judge, and the appointed district judges, consequent upon such designation. Section 23 was enacted so that the Senior Circuit Judge could act as peacemaker and compose the differences between the appointed district judges, and not that he himself should create such dissension. The second order of Judge Manton thus being void, as being in excess of any authority, we submit that he was without right to appoint receivers in violation of Rule 11-a of the General Rules of the District Court and that his action under Section 23 was totally without jurisdiction. The Circuit Court of Appeals of the Eighth Circuit so construed Section 23 in *Case v. United States*, 14 Fed. (2d) 510. It there appeared that Judge Kennamer had assumed jurisdiction in violation of a division of business order by presiding at the criminal trial of a defendant named Case. After conviction and sentence he brought a writ of habeas corpus to secure his release. The Circuit Court of Appeals (per Woodrough, *J.*), said, in part (p. 513):

> "It is clear that, if exactly the same official powers within a certain territory are conferred upon two men, there is a possibility of conflict. Manifestly, effective means to divide the powers necessarily involves a withdrawal of some powers from

> each. It is equally obvious that the withdrawal of the powers, when lawfully made, must be deemed absolute or the whole object and purpose of the division is defeated and the conflict remains.
>
> The proceedings here disclosed being in contravention of the order and the act of Congress were clearly void, and the petitioner for writ of habeas corpus was deprived of his liberty without authority of law."

In the case at bar the eight district judges of the southern district had, pursuant to the authority of Section 23 of the Judicial Code, divided the business of the Court by providing that applications for the appointment of receivers should be made to the Judge holding the motion part. Since the Senior Circuit Judge assigned the case to himself without the existence of the necessary prerequisite, namely, a disagreement among the district judges, his acts were entirely without jurisdiction.

Another case very much in point on the proposition that a Judge whose power to act in a given case is predicated upon the existence of certain conditions, cannot himself create such conditions for that purpose, is *Hanley* v. *City of Medford*, 56 Oregon 171 (1910).

There Section 1 of the Sessions Laws 1878 authorized Circuit Judges to hold circuit courts in any judicial district of the State where, for any reason, the judge elected for that district could not attend; and Section 2 authorized necessary orders to be made in any suit pending therein by any other circuit judge in the absence of the judge of the Court.

The facts of the case were, that an action had been commenced by the City of Medford in Jackson County to condemn and appropriate a right of way over the land of the plaintiff. The plaintiff demurred to the complaint, where-

upon the City applied to Judge Hanna, who was Judge of the Judicial District in which Jackson County was located, to call a special term to try said cause. Such application was denied on the ground of laches, whereupon the County Judge of said County applied to the Governor of the State to call a Special Term of the Circuit Court of Jackson County on the ground that Judge Hanna, owing to the status of judicial business in that County, was unable to hold, and for that reason had declined to call, a Special Term of Court. Acting upon this application the Governor directed Judge Coke, one of the Circuit Judges of the Second Judicial District, to proceed to Jackson County and call a special term of the circuit court for that county to try said particular cause. Accordingly, Judge Coke proceeded to said county and without the assent of Judge Hanna called said Special Term for a certain day to try said cause. The plaintiff not appearing, judgment was entered in favor of the city, condemning the right of way and awarding the plaintiff $600 therefor.

Thereupon the plaintiff brought suit to restrain the city from entering upon his land and to expunge from the journal of the Circuit Court the record of the proceedings had at the so-called special term of the court, upon the theory that the court pronouncing said judgment was not legally convened and that, therefore, said judgment was void and should be removed from record as a cloud on plaintiff's title.

It was held that the action was maintainable, on the ground that said judgment was void, because there was no authority in the Governor to authorize Judge Coke to call the special term nor in Judge Coke to call the same in pursuance of such authorization.

The Court said at page 178:

> "The power given is to hold circuit courts in any of the judicial districts of the State at the

time appointed by law or by the judge of the district in pursuance of law. This cannot include power to call a special term of the circuit court because the exercise of the power depends upon the inability of the judge of the district to attend. How can it be said that there is any inability of the judge to attend upon a court that does not legally exist? If no term has been appointed by law, and none has been called by him in pursuance of law, there is nothing upon which he is required to attend. *And to say that some other judge may appoint a term at a time when the judge of the district may not attend, and create a duty to attend is to say that he himself may create the condition on which the existence of the power he is attempting to exercise depends; that is, that he may invest himself with authority to call a term.* And for the same reason an order calling a special term of the circuit court in the district of another judge to try a particular cause is not an order in the action or suit to be so tried, as contemplated by Section 2 of the act, being Section 944, B & C Comp."

It follows that Judge Manton having himself created the condition upon which his power to intervene was based, namely, a disagreement between himself and the eight district judges, his second order which was the foundation of his power to act in the *Brake Shoe* case, was void, and, hence, the appointment of receivers by him was, likewise, *coram non judice.*

Case v. *United States,* 14 Fed. (2d) 510 *supra.*

II.

Senior Circuit Judge Manton had no power under Section 18 of the Judicial Code to designate himself to hold a district court to hear the *Brake Shoe* case, as it affirmatively appeared that no public interest required such designation and the order of designation was, therefore, void.

Judge Manton's "Designation Order" (R. 177) was made pursuant to the provisions of Section 18 of the Judicial Code, which provides:

> "The Chief Justice of the United States, or the circuit justice of any judicial circuit, or the senior circuit judge thereof, may, if the public interest requires, designate and assign any circuit judge of a judicial circuit to hold a district court within such circuit."

(a) *Since the record affirmatively shows what the alleged public interest was, such alleged public interest is the only one which may be considered.*

Whether or not the recital of Judge Manton in the order designating himself, that the public interest required such designation, would be conclusive that there was such a public interest, in the absence of a statement by the Senior Circuit Judge what such public interest was, is not of importance here, because in this case, we have not only the affidavit of James L. Quackenbush, which was the paper upon which Judge Manton acted in making said order, but also his opinion in *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 1 F. Supp. 820, expressly setting forth the nature of said alleged public interest.

It has been held by this Court that, where the record states the evidence or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred.

Old Wayne Life Ass'n v. *McDonough*, 204 U. S. 8, 17;
Galpin v. *Page*, 18 Wall. 350;
Johnson v. *Southern Pacific Co.*, 150 Cal. 535, 537.

It may be true that, where the particular public interest is not mentioned in the order of designation, it might be presumed that there was evidence before the Judge making the order showing the existence of what was the public interest requiring such designation. Here, however, the affidavit of James L. Quackenbush and the opinion of Judge Manton, above referred to, show that the public interest, which it is claimed required Judge Manton to designate himself a District Judge to assume jurisdiction in the *Brake Shoe* case, was the unwarranted fear that Judge Patterson, who was sitting in the motion part of the Court, and to whom under Rule 11-a of the General Rules of the District Court an application for the appointment of receivers should have been made, might possibly have appointed a corporate receiver, rather than individual receivers.

The affidavit of James L. Quackenbush is entitled "Affidavit Showing Necessity of Individual Receivers" (R. 175). In this affidavit Mr. Quackenbush says "that on account of the complexity of the questions which will arise from time to time in the course of the administration of the foregoing cause, he believes and he is informed that the parties hereto believe that it is important and in the public interest that no receiver in the cause should be a trust company

or any other corporation, but that the receiver or receivers should be an individual or individuals who could give constant and individual attention to the matter."

And Judge Manton in his opinion in the above case 1 Fed. Supp., 820 says at page 826, that counsel presented this affidavit of James L. Quackenbush to him on August 25, 1932, and that they protested their grave apprehension *that, if they applied to the District Court*, the Irving Trust Company might be appointed receiver. There was, however, no court rule calling for the appointment of a corporate or bank receiver in equity causes (R. 840). Judge Manton then states at page 827 of said opinion:

> "It therefore appeared to me, after considering the pleadings then before me, that this was essentially a case requiring, in the public interest as well as in the interest of the creditors, the appointment of individual receivers, the selection of which involved careful consideration by the Court of their personal qualifications and ability to manage such a street railway system."

It thus appears that the alleged "public interest" which Judge Manton says required him to designate himself, was a baseless fear that a corporate receiver might be appointed.

Therefore, under the authorities above referred to, it will not be presumed that there were other facts upon which the existence of a public interest requiring his intervention might be predicated.

(b) *The mere recital in the order of designation that the public interest required such designation was not conclusive.*

It will be found that Section 18 prior to the amendment of 1922 (42 Stat. 639), read, that "whenever, *in the judg-*

ment of the senior circuit judge of the circuit in which the district lies, * * * the public interest shall require, the said judge * * * shall designate and appoint any circuit judge of the circuit to hold said district court", whereas, by the amendment of 1922, the words *"in the judgment of"* were omitted. These words, however, were not eliminated by the amendment of 1922 from Sections 13, 16 and 17, of the Judicial Code, relating to the appointment of district judges.

Moreover, Section 18, as amended, in the second sentence of said section permits the Chief Justice of the United States *if in his judgment* the public interest requires to designate the judges of the United States Court of Customs Appeals.

We believe it is fair to assume that such change in Section 18, without a corresponding change in Sections 13, 16 and 17, was not meaningless and that the object of eliminating the words "in the judgment of" from the first sentence of Section 18 and retaining such language in the second sentence of said section, was intended to prevent a circuit judge from being designated arbitrarily to serve in the District Court and thus strip that Court of its Judges, unless the "public interest" required such designation as a matter of fact and not merely to satisfy a whim or other motive of the Judge making the designation.

There is, furthermore, authority for the proposition that a mere recital of "public interest" is not conclusive, but that it is proper to inquire into the facts to ascertain whether there was actually a "public interest".

In *State* v. *Kane*, 173 La. 36 (June 1931), a statute was construed which conferred upon the district judge power to fix sessions of the court in a judicial district composed of more than one parish, and which provided that, after fixing the date of such sessions no change in such date could be made within one year thereafter. The statute also

provided that the fixing of such sessions should not affect the authority of the judge to hold a session at any time in any parish in his district "whenever the public interest may require it".

The judge designated by the district judge to hold such session changed the date of the beginning of such session from the third Monday of May to the first Monday of May, although the third Monday of May had been fixed by said district judge within less than a year from such change.

Such change of date was attacked by the defendant. In order to sustain such change, on the ground that the public interest required it, *the judge making the same had to state facts upon which he based his action*, and, as such facts were found sufficient to justify the change, it was held that a verdict in a criminal case rendered at a term of the Court convened on said earlier date was valid.

The Circuit Court of Appeals relied on *People ex rel. Saranac Land & Timber Co.* v. *Extraordinary Special & Trial Term of Supreme Court*, 220 N. Y. 487, in holding that the recital of a public interest was conclusive as to the existence of such public interest.

In that case, however, the statute authorized the Governor of New York State to convene an extraordinary term of the court whenever "in his opinion the public interest so requires".

In the case at bar, Section 18 does not state that the opinion of the Judge making the designation shall determine whether the public interest requires such designation, and, therefore, we contend that that question should be established like any other fact, so that if there is *no evidence whatever* upon which to predicate a finding of public interest, such order lacks legal support.

The case of *Craig* v. *Hecht*, 263 U. S. 255, cited by respondents in their Circuit Court of Appeals brief, to

the effect that a simple finding of the public interest in a designation order is sufficient, is not in point, insofar as the *Brake Shoe* case is concerned. In the *Craig* case the question of the sufficiency of such a finding was not even raised or considered and furthermore the designation was made in 1921 before the 1922 amendment of Section 18, which amendment as heretofore stated deprived the Senior Circuit Judge of the power of subjectively determining what in his opinion the public interest is and making the test objectively, to wit, that there was in fact a public interest.

In *Pennsylvania Steel Company* v. *The New York City Railroad Company,* 221 F. 440, Judge Lacombe, in designating himself to sit in the District Court to hear a particular case where in fact there was a public interest, said that notwithstanding he had designated himself, if an objection had been made promptly as to the propriety of said order designating himself to hear a particular case, he would have presented a statement of the situation to the Chief Justice of the United States or a Circuit Judge. In the *Brake Shoe* case an objection was promptly made to Judge Manton's order of designation.

(c) *The alleged need of individual receivers did not constitute a "public interest", within the meaning of Section 18 of the Judicial Code.*

In order to interpret the meaning of a statute, it is proper to take into consideration the debates in Congress, as an aid to ascertaining the general object of the Statute and the mischief sought to be remedied.

> *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 650, 651.

In December, 1910, Chairman Moon of The Judiciary Committee of the House of Representatives, in explaining

the bill said at pages 88-89 of Vol. 46 of the Congressional Records:

> "Certain provisions contained in the bill make the plan recommended in this revision as fully elastic as the present system and avoid the necessity for the creation of any new judges. It is provided that if in any district the work devolving upon the District Court is too heavy to permit its prompt transaction by the District Court Judge a Circuit Court Judge not fully occupied may be designated to perform the work as a District Judge under exactly the same principles and regulations as District Court Judges now perform the work of Circuit Court jurisdiction."

At page 89, Mr. Madden:

> "If you take the Circuit Judges away from their original work would not that original work have to be done?"

Mr. Moon of Pennsylvania:

> "* * * I explained that in the first place eighty per cent. of all that work is now done by the District Judges, and that we have a provision that whenever in any district the work accumulates, the Supreme Court justice assigned to that circuit, or the Circuit Court Judge Senior in commission may designate a Circuit Judge to sit in the District Court and relieve the District Judge. Therefore, the machinery is so complete that it does not require a single additional judge."

The Court may also consider as a guide to the true interpretation of a statute, in order to dispel ambiguity, if any exists, the report of the committee having charge of such statute.

Oceanic Navigation Co. v. *Stranahan,* 214 U. S. 320;

Northern Pacific Ry. Co. v. *Washington,* 222 U. S. 370, 380;

Woodward v. *De Graffenried,* 238 U. S. 284;

Caminetti v. *U. S.,* 242 U. S. 470, 490;

Mennen Co. v. *Federal Trade Commission,* 288 Fed. 774 (C. C. A., 2nd);

Jordan v. *U. S.,* 36 Fed. (2d) 43 (C. C. A., 9th).

Mr. Moon, Chairman of the Judicial Reform Committee, in his Joint Committee Report to the House of Representatives in Document 783, Part I of the 61st Congress, Second Session, said regarding designations of Circuit Judges:

> "It is provided that if in any district the work devolving upon the district court *is too heavy to permit its prompt transaction* by the district court judge, a circuit court judge, not fully occupied, may be designated to perform the work as a district judge under exactly the same principles and regulations as district court judges now perform the work of circuit court judges."

In the Joint Committee reports accompanying the original Judicial Code of 1911 (Senate Reports, Vol. 4, on Revision of Laws, Judiciary Title, 61st Congress, 2nd Session and House of Representatives Reports, Document 783, Part I, 61st Congress, Second Session, on Revision of Laws, Judiciary Title), the respective committees similarly said in setting out the purpose of Section 18 and Section 19 of the Judicial Code:

> "Section 18—This section, in a strict sense, is new. Its purpose, as explained in the general report, is to permit circuit judges to try cases in the district courts in order to prevent congestion

of business in those courts, and to afford business for the circuit judges in circuits in which there is not sufficient business in the circuit courts of appeals to occupy the time of the judges.

"Section 19—In this section the words 'circuit or' are inserted in the first line of the section before the word 'judge'; and the words 'during the continuance of such disability, or, in the case of an accumulation of business', are omitted as being redundant; and by reason of the transposition of section 596, Revised Statutes, to precede this section and the insertion of new section 18, the word 'four' in the second line of the section is changed to 'six'. The purpose of changing the order of the sections is to avoid needless repetition of provisions."

It thus appears from the foregoing examination of the origin of Section 18 that the purpose of said section in providing for the designation of a Circuit Judge to sit in the District Court was solely to effect a prompt disposition of the business of the District Court, that is, to prevent a congestion of business in that Court.

In addition to this reason for the provisions of Section 18 there was this further temporary reason, namely, that it might happen that the Senior Circuit Judge had, prior to the abolition of the Circuit Court by the Judicial Code in 1911, partially heard a case, which it was in the public interest that he should conclude, and which, therefore, required him to designate himself as a District Judge for that purpose.

Pennsylvania Steel Co. v. *New York City Railway Co.*, 221 Fed. 440 (*supra*).

In this case Judge Lacombe said that congestion of the District Court or an unfinished case partially heard by a

Circuit Judge prior to the abolition of the Circuit Court were the only grounds justifying a Circuit Judge to designate himself as a District Judge.

If this is the correct interpretation of Section 18, then, of course, the order of Senior Circuit Judge Manton designating himself a District Judge to hear a particular case, which was not then in being, was without legal authority and, therefore, void.

(d) *In no event was there any justification for Judge Manton designating himself, until Judge Patterson refused to appoint individual receivers.*

On August 25, 1932 and August 26, 1932, Judge Patterson, who had been duly assigned to the motion part of the Court, was in his chambers ready to receive any application for the appointment of receivers in equity, but no application for such appointment was made to him in the *Brake Shoe* case (R. 705-6).

Before the parties adopted the unusual procedure invoked by them to have Judge Manton assume jurisdiction over the cause, they should have inquired of Judge Patterson whether he intended to appoint a corporate receiver or individual receivers. There was no rule of the District Court requiring the appointment of a corporate receiver in equity causes. It was only in bankruptcy proceedings that by Rule 27 of the Bankruptcy Rules the Irving Trust Company had been appointed standing receiver. The parties had no reason to believe that Judge Patterson would have appointed a corporation as receiver and, hence, were not justified on account of said alleged fear in going over the head of Judge Patterson and having Judge Manton designate himself District Judge for the sole purpose of assuming jurisdiction in the *Brake Shoe* case.

(e) *The general designation order of Judge Manton dated March 20, 1930* (R. 708), *is not applicable to the*

case at bar for the reasons given by Judge Woolsey in his opinion (R. 708), *first, because such general blanket orders have been entered by every Senior Circuit Judge to provide against possible unexpected emergencies and, the general order of Judge Manton is not in any way involved, either directly or indirectly in the present situation, secondly, because Judge Manton did not purport to act under this general order.*

(f) *Section 18 did not empower Judge Manton to designate himself to hear a particular case.*

Section 18 of the Judicial Code under which Judge Manton purported to act does not provide for any selective designation or any focussing of judicial activity in the District Court (per Woolsey, *J.*, R. 714). This section merely provides if the public interest requires, then a Circuit Judge of the Judicial Circuit may be designated to hold a *District Court* within such Circuit. Under the broadest interpretation, the language of Section 18 *"to hold a District Court"* cannot be interpreted to mean that a Senior Circuit Judge can choose to hear any particular case for any reason which he may arbitrarily deem sufficient. To so hold will continue the existing chaos in the efficient and smooth administration of justice in said District Court.

The Interborough receivers in the Court below cited as instances where a Circuit Judge was designated to hear a particular case, *United States* v. *Gill*, 292 Fed. 136; *McClintock* v. *United States*, 60 Fed. (2d) 839, and *Pennsylrania Steel Co.* v. *New York City Railway Co.*, 221 Fed. 440. In the *Gill* case, there was an action pending which the regular District Judge was disqualified from hearing, and thereupon the Senior Circuit Judge for the Fourth Circuit, because there was a vacancy and

no other District Judge available, designated another judge to try that particular case. This was equally true of the case of *McClintock* v. *United States*. In the *Pennsylvania Steel Co.* case (*supra*), Judge Lacombe had previously conducted proceedings in that case, and consequently there was a special reason for his continuing to conduct the proceedings in that particular case.

In the *Brake Shoe* case, Judge Patterson, before whom the case would have come in regular course under the District Court Rules, was not disqualified to hear it nor are the reasons given by Judge Lacombe in the *Pennsylvania Steel* case applicable here.

Where designations have been allowed to be made for a particular case, such effective Rules as 1-a and 11-a of the District Court (hereinafter to be discussed) were not in effect.

It is submitted, there was not even a cause of action in existence when Judge Manton made the order designating himself as a District Judge on August 25, 1932 in the *Brake Shoe* case. The court record shows that it was not until August 26, 1932 that the bill of complaint in the *Brake Shoe* case was filed in the Clerk's office (R. 170, 835, 836). Therefore, at the time the "designation order" was made, there was nothing to which it could attach itself.

III.

The "public interest" designation and "the division of business" orders being void, Judge Manton did not become a district judge.

It has been shown that the two orders of Judge Manton made on August 25th, 1932 were void. He, therefore, never became a District Judge. A point was made by counsel for the respondent in the court below that, because Judge

Woolsey did not vacate either the order by which Judge Manton designated himself or the order as to the division of business, he could not vacate the orders of Judge Manton appointing receivers. The answer to this argument is that such orders were innocuous, until Judge Manton took some action based upon such orders. In vacating the orders of Judge Manton which were predicated upon his designation as a District Judge to hear the *Brake Shoe* case, the orders of August 25th, 1932 became inert.

Since the orders of August 25th, 1932 were void, it necessarily follows that Judge Manton never became a District Judge and had no power to exercise the functions attaching to such a Judge.

In *Manning* v. *Ketcham*, 58 Fed. (2d) 948 (C. C. A. 6th), the Court said:

> "When a judge acts in the clear absence of all jurisdiction, *i. e.*, of authority to act officially over the subject matter in hand, the proceeding is *coram non judice*. In such a case the judge has lost his official function, has become a mere private person, and is liable as a trespasser for the damages resulting from the unauthorized acts. Such has been the law from the days of the case of *The Marshalsea*, 10 Coke 68. It was recognized as such in *Bradley* v. *Fisher*, 13 Wall. (80 U. S.) 335, 351. In *State ex rel. Egan* v. *Wolever*, 127 Ind. 306, the Court said: 'The converse statement of it is also ancient. Where there is no jurisdiction at all there is no judge, the proceeding is as nothing.'"

Even more in point is *Hanley* v. *City of Medford*, 56 Oregon 171 (1910), *supra*, pp. 19-20.

At page 175 the Court said:

> "A court consists of persons officially assembled under authority of law at the appropriate time and

> place, for the administering of justice, *Marsden* v. *Harlocker*, 48 Or. 90, 97 (85 Pac. 328, 331; 120 Am. St. Rep. 786). To constitute a lawful court, therefore, the persons who assume to hold such court and dispense justice must be officially assembled under authority of law, and the court must be held at the appropriate time and place appointed by law therefor. If the person assuming to act as judge was not then invested with judicial authority (that is, with the power of the law to declare and record its mandate), then his acts in attempting so to do are of no consequence whatever, and are void. And if he were fully invested with judicial authority, so as to make his pronouncement of the law effective, still the time and place of holding the court are equally essential; for, when the law prescribes the time and place for the holding of court, then time and place are as essential limitations of jurisdiction, as are subject matter and parties. *Ex parte Branch & Co.*, 63 Ala. 383; *McCool* v. *State*, 7 Ind. 378; *Brumley* v. *State*, 20 Ark. 77; *Norwood* v. *Kenfield*, 34 Cal. 329, 332; *Ex parte DeHay*, 3 S. C. 567."

In the case at bar, as in the above case, there was a judge, namely, Judge Patterson, who had been invested with authority and was ready to hear applications for the appointment of receivers in equity, to whom no application, however, was made to appoint receivers in the *Brake Shoe* case, and yet another judge, namely, Senior Circuit Judge Manton, assumed jurisdiction over said *Brake Shoe* cause, for fear lest Judge Patterson might not appoint individual receivers, although there was no evidence that Judge Patterson, if he had been asked to act, would have appointed a corporate receiver.

Upon such facts, it is respectfully urged, Judge Manton did not have power to supplant the duly assigned Justice, who, on the day in question, alone had authority to hear applications for the appointment of equity receivers.

IV.

The order appointing receivers cannot be sustained as that of a *de facto* judge.

If we are correct in our contention that Judge Manton never became a District Judge, his order appointing receivers cannot be sustained as that of a *de facto* judge.

It has been held that there cannot be a *de facto* judge acting or purporting to act in the part of the court in which a *de jure* judge is present and functioning.

U. S. v. *Alexander*, 46 Fed. 728, 729;
Hamlin v. *Kassafer*, 15 Or. 456, 459;
Boardman & Perry v. *Halliday*, 10 Paige (N. Y.) 223, 232;
Cohn v. *Beal*, 61 Miss. 398, 399;
State v. *Blossom*, 19 Nev. 312;
Cox v. *Railway Co.*, 68 Tex. 226;
Ridout v. *State*, 161 Tenn. 248 (1929);
Mechem on Public Officers, Secs. 322 & 323, p. 216.

In *Ridout* v. *State*, *supra*, there is an exhaustive review of the authorities, pointing out the difference between a *de facto* officer and a usurper. The Court at 270 of the opinion states that there are six exceptions to the application of the *de facto* rule. One of such exceptions is where, as pointed out in the other authorities above referred to, "a judge *de jure* was in actual present possession and occupancy of the office, in fact, functioning in discharge of its duties".

The other exception to the rule is "where the act, or exercise of the office was single, continuity being lacking".

In the case at bar, the facts are within both of these exceptions. There was a Judge *de jure* in actual present

possession and occupancy of the Motion Part of the Court, where applications for the appointment of receivers were required to be made, who was "functioning in discharge of its duties", to wit, Judge Patterson; secondly, the act of Judge Manton in making the order appointing receivers "was single, continuity being lacking" and such order was promptly attacked.

In *State* v. *Blossom*, 19 Nev. 312, the Court at page 315 uses this language:

> "Two physical bodies cannot occupy the same space at the same time, and two persons cannot be officers *de facto* for the same office at the same time."

There is, therefore, no escape from the conclusion that the order of Judge Manton appointing receivers cannot be validated as the act of a *de facto* Judge.

V.

The entire *Brake Shoe* proceeding was a collusive one the orders in which were properly set aside by Judge Woolsey.

There can be no reasonable doubt that the *Brake Shoe* case was collusive. The complaint was filed at the instigation of the Interborough in order to accomplish certain questionable purposes, chief among which was and is, to wipe out the entire equity of the stockholders and second mortgage bondholders of the Manhattan Railway Company (R. 35-6; 57-8; see note, p. 3, *infra*). The Receivers of Interborough have made it perfectly plain that such destruction is a present possibility. The Interborough Rapid Transit Company would thereby take unto itself a large system of elevated railroads conservatively estimated to be worth between $150,000,000 and $200,000,000 which has not a

single creditor other than the holders of its $41,000,000 of 4% bonds, which have fifty-seven years to run, without sinking fund or other onerous conditions. A few facts of record will suffice to show that these receiverships were prearranged.

In addition to the fact that the consent decree appointing the Interborough receivers was made at the instance of a single contract creditor (R. 164), it will be noted that Messrs. Chadbourne, Stanchfield & Levy, who were appointed solicitors for the Interborough receivers, had represented that company and its affiliated Brooklyn Manhattan Transit Company (called the B. M. T.) within less than a year prior to the receivership (R. 120); that Honorable Victor J. Dowling, one of the appointed Interborough receivers, was a member of the law firm of the said firm of solicitors, before he resigned to take up his receivership duties (R. 24, 72, 73).* Mr. Chadbourne, the senior member of said law firm, had for years been closely connected with the Brooklyn Manhattan Transit Company which owned a controlling interest in the Interborough stock at the time the receivership was created; the chairman of the board of the Interborough occupied the same position on the B. M. T. Board which was never favorably disposed toward Interborough or its step-child, Manhattan Railway Company, while all three companies had common directors (R. 24, 31, 59-62, 74). On October 10, 1932, four days after the hearing before Judge Woolsey, Messrs. Chadbourne, Stanchfield and Levy resigned as so-

* The New York Times of September 8, 1932, at page 2, gives the following report of an interview with Receiver Dowling: "Victor J. Dowling, former Presiding Justice of the Appellate Division, who was named as one of the Interborough receivers, arrived from Europe yesterday aboard the 'Europa'. He said his appointment had come as 'a complete surprise'. *He indicated it might necessitate his resignation from the law firm of Chadbourne, Stanchfield & Levy, which was named by Circuit Court Judge Martin T. Manton, as counsel for the receivers.* Mr. Dowling said he understood Thomas L. Chadbourne, head of the firm, once had owned Interborough and B. M. T. stock, but he did not know if he still had an interest in either company."

licitors for the Interborough receivers, following criticism leveled against them by the public (R. 549, 229). The bill of American Brake Shoe & Foundry Company was not only not reduced to judgment, but its modest claim on account of supplies furnished to Interborough was payable out of operating expenses, since there was a joint fund specially maintained by the City and the Interborough for the very purpose of paying claims of this nature under the existing contracts with the City of New York (R. 534). (See *Gilchrist* v. *Interborough R. T. Co.*, 279 U. S. 159, at pp. 196, 198). The Quackenbush affidavit and the Receiver's petition for the appointment of their counsel were both notarized by an attorney in the employ of Interborough. All of the executive officers of Interborough were retained in office at fabulous salaries following the receivership, and have since remained in office. The president and counsel of Manhattan was named as Receiver of the latter, and the bill and supplemental bills of petitioner Johnson specifically charge that the receivership of both companies were brought about pursuant to an understanding or conspiracy (R. 25-6, 37, 40-1, 44-5, 57, 70-72). The conclusion is irresistible that it was the purpose of the parties that the receivership should be in friendly hands. The Court below rested its conclusions that there was a controversy upon the ground that the plaintiff had presented its claim for payment and that it was refused. The fact is that Interborough had $5,317,468.51 cash on hand when the alleged refusal took place, while this simple contract creditors' claim for brake shoes and castings furnished was for $27,500 (R. 534). In our opinion, the record abundantly shows that the receivership was brought about to insure "friendly receivers" and "friendly solicitors" and a "friendly foreclosure and sale of the Manhattan Railway Company's properties". It cannot be denied that the alleged controversy was merely a sham and a pretense for the purpose of making it appear that there was a real con-

troversy where none actually existed. That is why Judge Woolsey was led to declare in his opinion, after pointing out that the orders of Judge Manton were entirely void (*Manning* v. *Ketcham*, 58 Fed. (2nd) 948-949):

> "In order to prevent chaotic conditions and the perpetuation by the intruder of his irregular procedure, a judge *de jure* may always vacate and declare void the orders of a usurping or intruding judge * * * His doing so is ultimately for the benefit of the litigants involved in the cause wherein the orders are vacated, and may, if his act is timely, prevent irreparable injury to one or all of them. THIS IS ESPECIALLY TRUE OF THE SITUATION HERE INVOLVED, FOR A CONSENT RECEIVERSHIP IN EQUITY, NOT BEING THE RESULT OF A CONTROVERSY, BUT OF AN AGREED SITUATION, SHOULD HAVE A JURISDICTIONAL FOUNDATION BEYOND SUSPICION BEFORE A COURT TAKES OVER THE OPERATION OF THE ESTATE."

In *Harkin* v. *Brundage*, 276 U. S. 36, 52, this Court said:

> "We do not wish what we have said to be taken as a general approval of the appointment of a receiver under the prayer of a bill brought by a simple contract creditor simply because it is consented to at the time by a defendant corporation. The true rule in equity is that under usual circumstances a creditor's bill may not be brought except by a judgment creditor after a return of '*nulla bona*' on execution.
>
> "* * * More than this, circumstances which should have no influence lead the parties in interest to prefer one court to another in the selection of the person to be appointed as receiver, with the hope on behalf of those in charge of the embarrassed corporation that the appointment may fall to one whose conduct will be in sympathy with, rather than antagonistic to, the previous management of the corporation, in the hands of which the embarrassment

> has arisen. As the Court of Appeals says, there should be no 'friendly' receiverships, because the receiver is an officer of the court and should be as free from 'friendliness' to a party as should the court itself." (276 U. S. 55.)

In *Shapiro* v. *Wilgus*, 77 U. S. Sup. Ct. (L. Ed.) 149, this Court said, in part:

> "True indeed it is that receivers have at times been appointed even by federal courts at the suit of simple contract creditors if the defendant was willing to waive the irregularity and to consent to the decree. This is done not infrequently where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good. *Re Metropolitan R. Receivership*, 208 U. S. 109, 111. * * * We have given warning more than once, however, that the remedy in such circumstances is not to be granted loosely, but is to be watched with jealous eyes. *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 345; *Harkin* v. *Brundage*, 276 U. S. 36, *supra*. *Never is such a remedy available when it is a mere weapon of coercion, a means for the frustration of the public policy of the State or the locality.*"

The italicized declaration of this Court last above quoted exactly fits the situation here involved. One of the chief objectives of the receivership was and is to have the Interborough receivers disaffirm or abrogate the existing perpetual lease of Manhattan Railway Company's lines of railroad to Interborough. The Interborough has obtained immensely valuable rights under its contracts with the City of New York as to operation of its subway system which have been held to be inextricably interwoven with the City contracts respecting the elevated lines of railroad, the latter being predicated and firmly founded upon the said

Manhattan lease (*City of New York* v. *Interborough*, 257 N. Y. 20, at p. 36). Said decision shows that the abrogation of the existing lease of Manhattan to Interborough would frustrate the local public policy of the City of New York and destroy the five cent fare upon which all of the valuable gifts and concessions by the City to Interborough were based. No one can nor has seriously questioned that the Interborough-Manhattan receiverships were and are collusive.

VI.

Rules 1-a and 11-a of the General Rules of the District Court were valid, and therefore the orders which violated them were void.

Section 731 of the United States Code declares that, "*The district courts may*, from time to time, and *in any manner* not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under section 730 of this title,

> *make rules * * * and otherwise regulate their own practice as may be necessary or convenient* for the advancement of justice and the prevention of delays in proceedings."

Section 23 of the Judicial Code, declares: "In districts having more than one judge,

> *the judges may agree upon the division of business and assignment of cases for trial in said district;*"

By virtue of the statutory authority above granted, the judges of the District Court by unanimous concurrence, adopted as General Rules of the Court, Rule 1-a and Rule 11-a, declaring that,

> "any judge designated to sit in the district court

> for the southern district of New York shall do such work only as may be assigned to him by the senior district judge";

also that,

> *"all applications for the appointment of receivers in equity causes * * * shall be made to the judge assigned to hold the * * * motion part of the business of the court and to no other judge."*

All of the eight District Judges subscribed to this rule. An appropriate order was also entered in the Clerk's office making its effective date July 1, 1932 (R. 702). The rule was also duly published in the New York Law Journal. Said rule adopted, under aforesaid statutory authority, merely states, in writing, the practice theretofore recognized and followed in this District for many years.

We contend that, both under the specific authority of Section 23 of the Judicial Code and under the rule making power conferred upon the District Court by Section 731 of the United States Code, the duly appointed eight District Judges for the Southern District of New York had power to adopt Rules 1-a and 11-a, and that such rules were binding on any judge thereafter properly assigned or designated to sit as a district judge, by virtue of any other section of the Judicial Code.

It has frequently been held that valid rules of the Federal Court have the force of statute.

> *Weil* v. *Neary*, 278 U. S. 160;
> *Galveston Dry Dock & Construction Co.* v. *Standard Dredging Co.*, 40 Fed. (2d) 442;
> *In re Rogers Pyatt Shellac Co.*, 43 Fed. (2d) 863, affirmed 51 Fed. (2d) 988 (C. C. A., 2nd Circuit);
> *In re Robertson*, 4 Fed. (2d) 248;
> *Rio Grande Irrigation Co.* v. *Gildersleeve*, 174 U. S. 603, 608.

Rules 1-a and 11-a were valid rules, and called for obedience, even as does a statute, from litigants, as well as from Judges.

Clawans v. *Whiteford*, 55 Fed. 2nd 1037 (C. C. A. D. C.);
Halter v. *Wade*, 273 Pac. 1042;
Lery v. *Michon Bros.*, 142 La. 825.

This is especially so where the rules are adopted pursuant to statutory authority.

Matter of Moore, 108 N. Y. 280, followed in 140 N. Y. 658;
People ex rel. Jordan v. *Martin*, 152 N. Y. 311;
Ex Parte Mayor of London, 25 Ch. D. 384.

The Supreme Court has held that, a departure from established rules or modes of procedure, will render judgments void, notwithstanding that the Court may have jurisdiction over the parties, and the subject-matter of the action.

Windsor v. *McVeigh*, 93 U. S. 274, 282;
United States v. *Walker*, 109 U. S. 258, 266-267;
Boyer v. *Boyer*, 129 App. Div. 647;
Henry v. *Carson*, 96 Ind. 412, at page 423.

The facts, and the procedure followed, bring this case directly within the language of *Manning* v. *Ketcham*, 58 Fed. (2d) 948 (C. C. A., 6th Circuit):

> "When a judge acts in the clear absence of all jurisdiction, *i. e.*, of authority to act officially over the subject-matter in hand, the proceeding is *coram non judice*."

Judge Manton was not a *de facto* Judge. We regret to say, he was an intruding Judge, for the reason as stated

by Judge Woolsey in his opinion (fols. 2154-2157), namely, that

> "there cannot be a *de facto* Judge acting or purporting to act in the Court or in the part of the Court in which a *de jure* Judge is present and functioning."

In *Shepard* v. *Adams*, 168 U. S. 618, it was held that a rule of the district court, even though inconsistent with a federal statute (Conformity Act), was valid, the Supreme Court saying, at page 627:

> "We have a right to presume that *the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question.*"

This case was followed in

Boston & Maine R. R. Co. v. *Gokey*, 210 U. S. 155, 164;

Van Doren v. *P. R. R. Co.*, 93 Fed. 260, 269 (C. C. A., 3rd Circuit);

Evans v. *Yost*, 255 Fed. 726 (C. C. A., 8th Circuit).

We submit that the Rules 1-a and 11-a are not inconsistent with any rule prescribed by the Supreme Court under said Section 730 which grants to the Supreme Court power to prescribe rules in respect to forms of writ, processes, modes of framing and filing proceedings and pleadings; taking and obtaining evidence, obtaining discovery, of proceeding to obtain relief, drawing up, entering and erolling decrees, and generally to regulate the whole practice to be used in suits in equity or admiralty by the district court. Equity Rule 79 provides that,

> "With the concurrence of a majority of the Circuit Judges * * *, the District Courts may make any other and further rules and regulations for the prac-

> tice, proceedings and process, mesne and final, in their respective districts not inconsistent with the rules hereby prescribed and from time to time to alter and amend the same."

Rules 1-a and 11-a do not conflict with this rule; they merely regulate the division of business arising in the district court. Clearly, the rules in question have nothing to do with procedure or practice in equity.

Judge Woolsey in his opinion (R. 714) explains that,

> "Rule 11-a merely tells where attorneys have to go to get a receiver appointed, and it does not deal with any practice of any kind in equity. It simply points to the door of the room where applications for receiverships must be made. I do not agree that General Rule 11-a is an equity rule" (R. 714).

The Rules of Equity Practice do not concern themselves with calendar rules governing particular districts. If the Supreme Court had considered that such question was a matter of equity practice to be regulated by it, it is only fair to assume that rules would have been promulgated on the subject. *None of the Federal Equity Rules, not even Rule 79, relate to matters of calendar practice.*

Rules such as Rules 1-a and 11-a, are, therefore, not rules regulating practice within the meaning of the Equity Rules, for the reason above advanced, and the reasons given by Judge Woolsey and, therefore, do not require such concurrence.

An interesting case in point as to the power of a body of Judges to distribute the work of the Court was considered in the case of *Ford* v. *Clarke*, 204 App. Div. 5, affirmed 236 N. Y. 606. In that case Section 2 of Article 6 of the Constitution of New York State provided:

> "The justices of the Appellate Division in each department shall have power to fix the times and

places for holding Special Terms therein, and to assign the justices in the departments to hold such terms; or to make rules therefor."

Section 84 of the Judiciary Law of the State of New York gave to the Justices of the Appellate Division the power to fix the times and places for holding trial as well as special terms.

The plaintiff, a Justice of the Supreme Court, asked for judgment against the Justices of the Appellate Division, First Department, compelling them to make assignments of Justices of the Supreme Court in such manner as to afford him opportunity to perform all the functions of his office by doing his fair share of all the work of the Supreme Court. The plaintiff, in support of his prayer for the above judgment, set forth in his complaint that the Judges of the Appellate Division had assigned him to the tort and contract cases during a much longer period in the aggregate than a fair division of the work of the Court required, and had not assigned him to Special Term work to the same extent as the other Judges of the Supreme Court had been assigned. The Court dismissed the complaint, saying at page 7:

> "The power to distribute the work of the court among the twenty-eight trial justices of the First Department must of necessity rest somewhere. *The object of its exercise is to secure the highest degree of efficiency in the administration of justice and so promote the interest of the public.* Upon the justices of the Appellate Division the power of allotment of the work has been conferred by the Constitution, and it is their duty to exercise it according to their best judgment. They must determine the assignment of the trial justices to contested motions, to ex parte applications, to criminal trials, to

equity, or to trials at law before court and jury, so as best to subserve the interest of the public in the dispatch and accuracy of legal judgments. *Discretion in the exercise of this power is necessarily implied, and no other court or tribunal can substitute its judgment and discretion for theirs.*"

"*The gift of this power* (to make rules) *imposes the duty to exercise it.*"

"A justice suffers no injury and is deprived of no legal right by the act of the justices of the Appellate Division in assigning him principally to Trial Term work" (Headnote).

"His desires must yield to the concerted judgment of the seven justices comprising the Appellate Division."

We believe this language aptly applies to the situation in the case at bar. Section 23 of the Judicial Code provides, that in districts having more than one district judge, the judges may agree upon a division of business and assignment of cases for trial in said district, and it is only in cases where they do not so agree, that the Senior Circuit Court may make orders for the division of such business and assignment of such cases for trial. *Here all of the district Judges agreed as to the division of business and, under the reasoning of the above decision, and particularly the language of Section 23 itself, no other Judge had the right to substitute his judgment and discretion for theirs.*

Not only does Section 23 of the Judicial Code specifically grant to the judges appointed for the Southern District of New York the sole authority to agree upon the division of business, but said section conversely operates also as an inhibition against the Senior Circuit Judge from making any orders for the division of business, where the regularly appointed Judges for such district duly agree upon such division of business.

If Judge Manton desired to question or attack the validity of Rules 1-a and 11-a, he should have adopted the course pursued by Judge Ford in the above case, as suggested by Judge Woolsey in his opinion where he says:

> "It should also be observed here that the validity of rules of a District Court cannot be determined by the administrative orders of a Senior Circuit Judge. Their validity can only be tested judicially in a proper case, and unless so tested, and invalidated, they are binding on all who do business in the Court which made them."

We might well stop here, and go no further with our argument to show that Rules 1-a and 11-a could not be ignored by Judge Manton, for the reason that having invoked Section 23 as the basis of his designation he was under the necessity of establishing that there was, in fact, a disagreement among the Judges below before he could either disregard or interfere with the operation of said rules.

In the court below respondents endeavored to show that the above rules were inconsistent with Sections 9, 13, 14, 15, 16, 17, 18 and 19 of the Judicial Code (being Sections 13, 17, 18, 19, 20, 21, 22 and 23 of Title 28 of the United States Code). This may seem impressive, but it will be found that the said sections all deal with the designation by the Chief Justice of the United States, by the Senior Circuit Justice, or by another Circuit Justice, of other District Judges to sit in the place of those disqualified or unable to sit in such district for various reasons.

Said sections relate specifically to the particular situations mentioned therein and authorize such designations only by reason of the existence of the special state of facts recited therein. It was argued that the judges of the district court cannot pass a rule to prevent the substitute

or additional Judges from sitting in any part of the district court that they might themselves choose, regardless of existing practice and rules; in other words, that such visiting or substitute judges may be a law unto themselves, because it is stated in said sections that such substitute or additional Judges shall have all the powers and rights and perform all the duties of a judge of the district court.

We submit that all of these sections relating to the designation of substitute or additional District Judges by the Chief Justice of the United States or by the Senior Circuit Justice or other Circuit Judge, must be read together, and harmonized to the fulfillment of the purposes for which they were enacted.

It is a well-settled canon of construction that a statute general in its terms will be deemed restricted in its application by another statute relating to the same subject-matter but narrower in scope.

When, therefore, certain sections of the Judicial Code provide for the designation of substitute or additional district judges, giving such judges the same powers as the duly appointed judges for the same district, such powers must be exercised in subordination to Court rules, such as Rule 1-a and Rule 11-a, which were adopted in pursuance of a specific statute, to wit, Section 23 of the Judicial Code, expressly granting such appointed Judges for the district the power to agree among themselves as to the division of business, and under express statutory authority "to make rules * * * and otherwise regulate their own practice" (Sec. 731).

Moreover, as far as Rule 11-a is concerned, as was said in *Ford* v. *Clarke*, 204 App. Div. 4, affirmed 236 N. Y. 606, *supra*, the power to distribute the work of the Court among the District Judges must, of necessity, rest somewhere. What the respondents contended for in the Court

below was that a designated Judge should not be on the same plane with the regularly acting Judges for the District, but that he shall be superior to them, not bound by their rules as to the division of business, but a sort of free lance, at liberty to set at naught the rules of the court on that subject lawfully adopted prior to his designation. Such a theory would introduce chaos in the district court, particularly when several additional Judges are designated to sit there, each of whom could, under such a contention claim to be a law unto himself, differing each from the other as to what part of the Court he desired to sit in, and what kind of work he desired to perform, notwithstanding the existence of a uniform rule theretofore unanimously adopted on the subject by the eight appointed Judges.

After an all-day argument before Judge Woolsey, we pointed out that no substantial reason had been advanced for declaring that the rules in question were invalid, and the court and counsel agreed (R. 970); while as we have already observed in our statement, *infra*, page 12, the counsel in chief for the respondents frankly admitted that if the rules were validly adopted, they were binding alike upon the judges as well as litigants (R. 885, R. 918).

VII.

Rules 1-a and 11-a were not merely directory rules and hence a violation thereof rendered the appointment of receivers *coram non judice*.

Assuming that Judge Manton's designation of himself as District Judge was valid, and that Rules 1-a and 11-a were valid rules, the question is presented whether the admitted violation of said Rules by Judge Manton rendered void his order appointing receivers.

Rules 1-a and 11-a were passed in pursuance of Section 23 of the Judicial Code, above cited, which permits district judges, in districts having more than one judge, to agree upon the division of the business of the Court. They did so agree by virtue of said rules.

We contend the said rules having thus been passed in pursuance of a specific statute itself, had the force of a statute, and their violation rendered the order appointing receivers void.

> *Case* v. *United States*, 14 Fed. (2d) 510 (*supra*);
> *Matter of Moore*, 108 N. Y. 280;
> *People ex rel. Jordan* v. *Martin*, 152 N. Y. 311.

In the *Matter of Moore, supra,* a rule of the Court of Appeals with reference to an applicant for admission to practice as an attorney required proof that the applicant had before, or within three months after the commencement of his clerkship, passed the prescribed Regents' examination. This rule was made under special statutory authority. The applicant failed to file the Regents' certificate showing that he had passed such examination within three months after the commencement of his clerkship. The Court held

that such certificate could not be filed *nunc pro tunc*, saying:

> "The rules of courts are made under special statutory authority, and when made, have the force and effect of statutes (*People ex rel. Mayor, etc.* v. *Nichols*, 18 Hun 535). While a rule, which is merely directory in its provisions, may be disregarded or obviated by allowing the act required to be performed to be done *nunc pro tunc*, this is not so with reference to mandatory provisions * * *. When the rule was adopted it became the law for the court as well as for the citizens upon whom it was designed to operate, and we have no more power to disregard its provisions in determining the rights of a student, than we should have to disregard the force of a statute in determining the rights of individuals thereunder."

The language of Rules 1-a and 11-a is mandatory. We submit that said rules based on special statutory authority rendered void the order involving their violation.

Even if said rules be deemed not to have been made, in pursuance of Section 23 of the Judicial Code, but under the general rule-making power vested in the District Court by Section 731 of Title 28 of the United States Code, the same conclusion must be reached.

As already observed, it has been held that valid rules of the Federal Court, although made only under general statutory authority and not specific statutory authority, have the force of statute.

See cases, *supra*, p. 43.

The Court below held that the rules under consideration being merely for the distribution of business, they must be deemed directory and not mandatory rules. For that reason, the Court reached the conclusion that the order of

Judge Manton, which violated Rule 1-a and Rule 11-a, could be invalidated only by direct attack, and held that the *Johnson* case was a collateral attack. The Court below cited *Scranton Button Co.* v. *Neonlite Corp.*, 105 N. J. Eq. 708, wherein Chancellor Walker vacated a decree made on the advice of a vice chancellor who had disregarded a rule for the distribution of business, and endeavored to distinguish said authority from the case at bar by explaining that the decree which was vacated was in the same suit and the property had already come into the custody of the Court of Chancery in another suit. The Court below, however, did not dispute the proposition laid down in *Scranton Button Co.* v. *Neonlite Corp.*, *supra*, that a decree violating a rule for the distribution of business should be set aside. We shall now endeavor to show that the attack on the order of Judge Manton was a direct attack, and not a collateral attack, and, that, even if we assumed the order was irregular and not void, it should nevertheless have been vacated.

VIII.

The *Johnson* suit was a direct attack and not a collateral attack on the order appointing receivers.

The Court below held that the *Johnson* suit was a collateral attack. We do not agree, but even so, if the order of Judge Manton was void, it could be attacked collaterally.

Thompson v. *Whitman*, 18 Wall. 457;

National Exchange Bank v. *Wiley*, 195 U. S. 257, and cases cited;

Johnson v. *North Star Lumber Co.*, 206 Fed. 624 (C. C. of A., 9th Cir.);

Phebus v. *Search*, 264 Fed. 407 (C. C. of A., 8th Cir.);

Nardi v. *Poinsatte*, 46 Fed. (2d) 347.

Nor will it be disputed that parties cannot confer jurisdiction, where none exists.

Exporters & Manufacturers Products Inc. v. *Butterworth Judson Co.*, 258 U. S. 365;
Barnett v. *Mayes*, 43 Fed. (2d) 521 (C. C. A., 10th);
Gatch Tennant & Co. v. *Mobile & O. R. Co.*, 59 Fed. (2d) 217, and cases cited.

Quite to the contrary, the Court itself must inquire into its jurisdiction, at every stage of the proceedings, and, if it has none, must give appropriate relief.

Matson Nav. Co. v. *U. S.*, 52 Supreme Court Reporter 162 (284 U. S. 352).

We contend, however, that the attack upon the decree in the *Brake Shoe* case was a direct attack, and not a collateral attack.

There is a valuable note in L. R. A. 1918 D, page 470, entitled "What is a collateral, and what a direct, attack upon a judgment, within the rule that a judgment that is not void cannot be attacked collaterally". At page 470, it is stated:

> "An action or proceeding, even if an independent one, brought for the purpose of impeaching or overturning a judgment, is a direct attack as distinguished from a collateral attack upon the judgment."

In *Seay* v. *Hawkins*, 17 Fed. (2d) 710 (C. C. A., 8th), a suit was brought to enjoin a tax collector from levying on and selling plaintiff's property for delinquent taxes. The Court held that the suit was a direct attack, for the reason that the relief asked included the prayer that the judgment for taxes be set aside. The Court cited *Powell*

& Garard Co. v. *Erath Co., Tex.*, 274 Fed. 305, cert. denied 257 U. S. 645; *Gray County, Tex.* v. *Hamer*, 277 Fed. 155, cert. denied 258 U. S. 624.

In *Warren* v. *Union Bank of Rochester*, 157 N. Y. 259, it was held that the fact that an action seeks to have the mortgage upon an infant's real estate, as well as the whole proceeding in which its execution was directed, set aside, does not render the action a collateral, instead of a direct, attack upon the proceeding. The Court cites *Bank of U. S.* v. *Ritchie*, 8 Peters 128, in which the opinion was written by Chief Justice Marshall. In that case a bill of review, which was a separate proceeding, was brought to set aside a decree in another suit because of various errors therein and it was held that because of such errors the decree should be reversed and the conveyance of the real estate made under the original decree set aside.

See also:

James v. *Young*, 111 Kan. 310 (1922).

The rule as stated in 1 Freeman on Judgments (5th Ed.), pages 606-607, is as follows:

> "The object, of course, for which the suit or action is brought is a determining factor. If instituted for the very purpose of setting aside, correcting or modifying the judgment, it is usually regarded as a direct attack, for the attack upon the judgment in such cases is not incidental to the object of the proceeding, and the end of the proceeding is not something collateral to the judgment."

It follows, therefore, under the above authorities, that the *Johnson* suit, in which the prayer for relief was that the decree in the *Brake Shoe* case be vacated and set aside, was a direct and not a collateral attack upon such decree.

IX.

Petitioner's attack upon order appointing receivers by filing an independent bill was proper.

The Circuit Court of Appeals held that notwithstanding Judge Manton violated the effective rules of the District Court, by the order appointing receivers, such order was not void and, therefore, could not be attacked by independent bill.

This whole argument rests upon the assumption that the *Johnson* suit was a collateral and not a direct attack on the decree in the *Brake Shoe* case. We have shown in a preceding point that the court below erred in holding that the *Johnson* suit was a collateral attack on such decree. If correct in this view, then the basis for the conclusion that an independent action did not lie, is destroyed.

However, even assuming that the *Johnson* suit was a collateral attack, we contend that petitioner had the right to attack the decree in the *Brake Shoe* case by such independent action, to which all of the parties in the *Brake Shoe* case were made parties defendant. The Circuit Court of Appeals held that, if petitioner had any other way of setting aside the decree in the *Brake Shoe* case, recourse could not be had to an independent action. We dispute the soundness of this conclusion and maintain first, that petitioner who was a stranger to the bill in the *Brake Shoe* case, had no right to appear specially therein, for the purpose of impeaching the decree therein made; and secondly, even though such procedure might have been open to him, he was not limited to this mode of attack, but was also privileged to proceed by independent action to accomplish the desired purpose.

(a) *The petitioner had no right to appear in the Brake Shoe case to attack the jurisdiction of the Court.*

We contend that Equity Rule 37 precluded an attack upon Judge Manton's orders by intervention and appeal, in the *Brake Shoe* case, for the reason that intervention must be subordinate to and in recognition of the propriety of the main proceeding.

> Rule 37, Rules of Equity Practice;
> *U. S.* v. *California Canneries*, 279 U. S. 553, and cases cited;
> *Central Republic Bank & Trust Co.* v. *Caldwell*, 58 Fed. (2d) 721 (C. C. A., 8th).

The Circuit Court of Appeals states in its opinion on this point (R. 1033):

> "It is true that any intervention must be 'in subordination to, and in recognition of, the propriety of the main proceeding.'"

The Court then suggests:

> "They too wished a receivership, and indeed had no objection to 'the propriety of the main proceeding', except for the judge who was to conduct it, and the receivers appoint."

The lower court failed to observe that the foundation of petitioner's objection to the *Brake Shoe* case was that it was wholly void, because Judge Manton had no power to assume jurisdiction therein. The attack was thus made on the proceeding itself, not on the particular judge, except insofar as he was the one who, by assuming jurisdiction, had rendered a void decree. Obviously, as the proceeding itself lacked a proper legal basis, the petitioner could not supply the jurisdictional defect therein, but it was necessary to remove the illegal foundation and proceed anew for the appointment of other receivers.

It is stated by the court below that the petitioner could

have appeared on the return day of the order to show cause why the receivership should not be made permanent and have asked the removal of the cause to another judge. There are several answers to this argument. In the first place, the petitioner being a stranger to the *Brake Shoe* case had no right to be heard on the return day except by intervention granted by the court upon leave being asked to intervene; and, as we have pointed out, intervention would not have been allowed, where the purpose thereof was not merely to remove the proceeding to another judge, but to upset such proceeding as entirely illegal. There is no practice known to the federal court or any other court, which permits a stranger to a proceeding, to appear specially therein, for the purpose of vacating such proceeding. He has no standing to make such attack. It is only after the parties to such proceeding have made such stranger a party thereto that he may assert his rights.

The Circuit Court of Appeals cited no authorities in support of its view that petitioner could have raised the point in the *Brake Shoe* case without intervention therein, which latter course was admittedly not available to petitioner. The lower court cited several authorities on the proposition that, where an attack upon a decree is collateral, such attack will not be upheld, if the decree is not void, unless the party had no other recourse than such collateral attack. We submit that said cases are not in point.

In *Grant* v. *Leach & Co.*, 280 U. S. 351, a State Court made a decree appointing a receiver, who then brought suit against the defendant in the federal court. The defendant attacked the decree on the ground that the Court erred in appointing the receiver. It was held that the decree of the State Court, not being void, could not be attacked collaterally in the federal court. In the case at bar, however, not only was the petitioner's proceeding instituted in the

same court which appointed the receivers, but the parties to both the *Brake Shoe* case and the *Johnson* suit are identical.

The same distinction exists between the case at bar and *Lively* v. *Picton*, 218 F. 401, and *Wagner Electric Mtg. Co.* v. *Lyndon*, 282 Fed. 219, relied upon by the Circuit Court of Appeals.

In *Blake* v. *District Court*, 59 Fed. (2d) 78, also cited by the court below, the petitioner could have intervened in the district court to correct its alleged error, because in that case the entire proceeding was not attacked as void, but the claim was made merely that a receiver should not have been appointed without notice to petitioner. Furthermore, the question was not involved, as in the case at bar, whether the petitioner might not have instituted a separate proceeding to set aside the decree, because the petitioner did not attempt to do this, but applied instead to the Circuit Court of Appeals for a writ of certiorari. The Court said at page 79, in speaking of a writ of certiorari:

> "But it may not be used under this provision as a substitute for an appeal or writ or error to correct mere errors committed in the exercise of a lawful jurisdiction."

In other words, the Court merely held that a writ of certiorari was not the proper remedy to correct such error, but did not say that such error could not have been remedied in the district court by an independent bill.

> (b) *Even if petitioner could have appeared in the Brake Shoe case, without a formal intervention, to attack the decree therein, he also had the right to maintain an independent action in the same court for the purpose of such attack, in which the parties were the same as in the Brake Shoe case.*

Petitioner contends that the only recourse open to him to obtain the relief which he prayed for in his bill of complaint was by such independent proceeding, and, in any event, he was entitled to maintain it as an additional mode of obtaining such relief. We have shown that such independent proceeding was the only method by which the petitioner could obtain the relief he asked. However, there can be no doubt that under the authorities such procedure was justified, even though he might have asserted his rights in some other way.

In *State Trust Co.* v. *Kansas City P. & G. R. Co.*, 120 Fed. 398, cited with approval in *U. S.* v. *California Canneries*, 270 U. S. 553, *supra*, the Court said at page 407:

> "In so far as the intervenors ask for relief on the ground last mentioned, they manifestly seek to impeach the decree by depriving it of the effect of a decree of foreclosure, which it was intended to have, and by imputing to it an entirely different effect. They seek in this way to overthrow the decree, although they came into Court subsequent to its rendition, and ostensibly, at least, for the purpose of availing themselves of some of its provisions. This they should not be permitted to do, especially as they can readily enforce the rights which they now assert by an original bill, if such rights exist. As the intervenors were not parties to the foreclosure suit, they are not bound by the decree therein, if that action was not brought in good faith to secure the foreclosure of a mortgage but was brought, by collusion between the bondholders and stockholders of the old company, for the fraudulent purpose of enabling the stockholders to appropriate a part of the corporate assets, to the prejudice of the corporate creditors. If the decree is to be assailed on the ground, and such seems to be the second ground of assault—then it should be made by an original

bill, inasmuch as the general rule is that one who is not a party to a suit, but who intervenes, comes in in subordination to the record as he finds it, and will not be permitted to raise new issues or delay final action in the case, or insist upon a change in the form of the proceedings. (11 Enc. Pl. & Prac. 509, 510, and cases there cited.) If this is the rule as respects an ordinary intervention filed in advance of a final judgment or decree, much greater reason exists for requiring one to proceed by an original bill who comes forward after a final decree, and after third parties have acquired rights thereunder, and proposes to impeach it for reasons dehors the record."

In *Hopkins* v. *Lancaster*, 254 Fed. 190, cited with approval in *U. S.* v. *California Canneries, supra*, it was held that a stranger cannot intervene for the purpose of defeating the entire suit, not for the purpose of litigating with the complainant his right or title to any relief, and if it is desired to set up a new and independent claim, it must be done by an original bill in the nature of a cross bill.

We think a conclusive answer to the suggestion and finding of the lower court that petitioner should have appeared on the return day before Judge Manton on September 22nd, 1933 is that Elon S. Hobbs, a stockholder of Manhattan, endeavored to intervene in the *Brake Shoe* case by filing a petition for intervention, but Judge Manton refused to allow or act upon it (R. 326-328). The same treatment would undoubtedly have been accorded the petitioner had he sought to intervene or appear specially on the return day.

X.

Petitioner's bill of complaint stated a good cause of action cognizable in equity.

It is not disputed that the District Court had jurisdiction of the *Johnson* suit. This cause was brought by a citizen and resident of Kentucky, which is a different state from the state in which all of the defendants resided at the time of the filing of the bill (R. 13), and the suit was instituted by him in his derivative capacity as a minority stockholder of the Manhattan, and in behalf of such other stockholders of Manhattan as might join herein and become parties thereto (R. 14).

The stock owned by complainant was of a par value of $10,000, so that the matter in controversy exceeded the jurisdictional amount of $3,000. However, in a derivative stockholder's action the amount in controversy is not the value of the stock of complainant, but the value of the entire corporate assets.

Klein v. *Wilson & Co., Inc.*, 7 Fed (2d) 772, affirmed 7 Fed. (2d) 777;
Hutchinson Box Co. v. *Van Horn*, 299 Fed. 424;
Johnson v. *Ingersoll*, 63 Fed. 2nd 86 (C. C. A., 7th).

There can, furthermore, be no doubt that a federal court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, to determine the corporation's solvency, and distribute its assets.

Cole v. *Philadelphia & E. Ry. Co.*, 140 Fed. 944 (reversed on other grounds, 149 Fed. 647);
O'Neil v. *Welch*, 245 Fed. 261 (C. C. A., 3rd Circuit);
Klein v. *Wilson*, 7 Fed. (2d) 777 (C. C. A., 3rd Circuit).

This is particularly true in this cause where the federal court has acquired jurisdiction over the *res*.

O'Neil v. *Welch* (*supra*).

Not only did the Court have jurisdiction in equity of the *Johnson* suit, by reason of the nature of the cause, but also because, at the time suit was instituted, the district court had taken possession through temporary acting receivers of the property of Manhattan, the latter's lines of railroad being in possession of Interborough, under lease.

It was seriously contended below that demand should first have been made upon the Manhattan receiver to bring the action before Johnson as a stockholder, suing on behalf of Manhattan, could institute the same. In other words, that Johnson should have asked (Roberts) one of the parties to the collusive arrangement by which Interborough was thrown into receivership, to assume the burden of attack on the Court which had appointed him as receiver a few days earlier. Such demand would have been futile, because Johnson in his bill of complaint attacks the appointment of said Roberts, as receiver of Manhattan, upon the ground that his appointment was unlawful, irregular and void. Roberts was the president of Manhattan at the time of his appointment and on November 9th, 1932, the said Roberts was ousted as president at a meeting of stockholders of said Company by an overwhelming vote (see note, *infra*, p. 4). Furthermore, in his bill of complaint, Johnson attacked the actions of the directors and officers of Manhattan who were also directors of Interborough and B. M. T., and, therefore, a request on Roberts to attack his own conduct, and that of his fellow directors in a suit to be brought by him, would have been denied and futile (R. 30-1; etc.).

It has frequently been held that, where there is antagonism between the directorate and the corporate interest, as in the case at bar, the requirements of Equity Rule 27 may be dispensed with. (See Opinion of Judge Woolsey, R. 709.)

> *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 213 U. S. 435 (construing Equity Rule 94, now Equity Rule 27);
> *Ogden* v. *Gilt Edge Cons. Mines Co.*, 225 Fed. 723;
> *Whittaker* v. *Brictson Mfg. Co.*, 43 Fed. (2d) 485 (C. C. A., 8th Circuit).

Judge Woolsey after considering the sufficiency of the bill of complaint as well as the supplemental bills, declared:

> "In my opinion, the bill of complaint is not demurrable, but, on the contrary, sets forth good grounds in equity for the relief it asks" (R. 710).

The opinion of the Circuit Court of Appeals expressed no opinion on the sufficiency of the bills (R. 1035).

XI.

Petitioner's supplemental bill is not multifarious.

It was claimed below that the Johnson supplemental bill of complaint was multifarious, because it was alleged therein that the suit was brought on behalf of Manhattan stockholders, as well as bondholders, and "all others financially interested in said company". There are two answers to this contention: In the first place, this alleged objection was not made to the supplemental complaint in the

district court, and cannot be heard for the first time on appeal.

Oliver v. *Piatt*, 3 How. 333;
Barney v. *Latham*, 103 U. S. 205;
Miller Rubber Co. v. *Behrend*, 242 Fed. 515 (C. C. A., 2nd Circuit).

Secondly, causes of action existing on behalf of several plaintiffs, although not joint, may be united in one bill, where there are sufficient grounds for uniting the causes of action in order to promote the convenient administration of justice.

Equity Rule 26.

Since the adoption of said rule in 1912, it has been held that any parties whose rights are violated by a single act of the defendant, may unite in one bill for redress.

International Organization, etc. v. *Red Jacket C. C. & C. Co.*, 18 Fed. (2d) 839, 847-848 (C. C. A., 4th Circuit);
Lion Laboratories, Inc. v. *Campbell*, 34 Fed. (2d) 642 (C. C. A., 2nd Circuit).

In the first mentioned case, the Court cited with approval from *Kitchen & Co.* v. *Local Union*, 91 W. Va. 65, 70, in which the Court said:

> "If by the use of such methods, directed and applied to the business of each of the plaintiffs, all are prevented from prosecution of their respective enterprises, they all are similarly affected by the same illegal cause, wherefore they may unite in resisting it, and there is no misjoinder of parties plaintiff."

In the case at bar, Johnson and other stockholders and second mortgage bondholders of Manhattan, and Lillian Boehm, a bondholder of Interborough, were all affected by the acts of Interborough, of which complaint was made, and all had and have an interest in the *res,* which is in possession of the Court.

XII.

No order granting leave to sue the receivers was necessary and, in any event, Judge Caffey's order did not have to be obtained in the *"Brake Shoe* case".

If we consider that this question is before the Court, we contend that it was unnecessary to obtain leave to sue the receivers, where such receivers were appointed by the same Court as that in which the suit was brought, assuming that such appointment was valid.

> *Ambrose* v. *Brown*, 42 App. District of Columbia 25 (1914).

Leave to sue was unnecessary in any event under Section 66 of the Judicial Code, even though the *Johnson* suit did not relate to a cause of action arising from the conduct of the receivers themselves, or their agents.

> *Hall* v. *Wilson*, 35 Fed. (2d) 189.

But if such leave was necessary, the application did not have to be made to Judge Manton in the *Brake Shoe* case, for the unanswerable reason, that Johnson claimed and asserted that Judge Manton lacked the power to appoint such receivers in that case, and such receivers were all made parties to the *Johnson* suit for the express purpose of vacating the receiverships, and to have new receivers appointed for said properties.

XIII.

Jurisdiction was not destroyed by the intervention of Lillian Boehm in the *Johnson* suit.

The fact that Lillian Boehm, a citizen of the same State as several of the defendants in the *Johnson* suit, intervened by consent in the *Johnson* suit after the commencement of said proceedings, does not destroy the jurisdiction of the Court.

The Interborough receivers in the Court below contended that said intervention destroyed the jurisdiction of the Court, citing cases. However, none of said cases were in point for the reason that they were not class suits, as is the petitioner's cause; besides, in the suit at bar, the *res* was already in possession of the Court while in the cases relied upon by the respondents such was not the case.

The second reason why the intervention of Lillian Boehm did not destroy the jurisdiction of the Court is, that she was *not* a necessary party to the *Johnson* suit, even though she may be deemed a proper party.

The action was brought by Johnson on behalf of himself and all other stockholders of Manhattan who might become parties to the suit by leave of Court (R. 14-15). The petition of Lillian Boehm for intervention alleges that she is the owner of 1,400 shares of Manhattan stock (R. 139). The action of Johnson being brought for the benefit of all the stockholders and the corporation, it was unnecessary for her to intervene separately, in order that a complete determination of the issues raised by the Johnson bill of complaint could be had and, therefore, she was neither a necessary nor an indispensable party, and by her intervention, although she was a citizen of the same State as some of the defendants, could not destroy the jurisdiction of the Court after it had attached.

Wichita R. & Light Co. v. *Public Utilities*, 260 U. S. 48;

Salem Trust Co. v. *Mfgrs. Finance Co.*, 264 U. S. 182;

Fraser v. *Cole*, 214 Fed. 556 (C. C. A. 7th Circuit);

Elder v. *Western Mining Co.*, 280 Fed. 569 (C. C. A. 8th Circuit);

Vogue Co. v. *Vogue Hat Co.*, 12 Fed. (2d) 991, 992 (C. C. A. 6th Circuit);

Egyptian Noraculite Co. v. *Stevenson*, 8 Fed. (2d) 576 (C. C. A. 8th Circuit).

XIV.

The Circuit Court of Appeals was in error in setting aside the consolidation order of Judge Woolsey.

Although as shown under Point IX of this brief, the rights of the parties to the *Johnson* suit can be enforced by independent bill, without the aid of the consolidation of the *Johnson* suit and the *Brake Shoe* case, it was within the inherent power of Judge Woolsey and within his sound, reasonable and wise discretion to consolidate the two actions.

Mutual Life Ins. Co. v. *Hillmon*, 145 U. S. 285, 292;

See—*Adler* v. *Seaman*, 266 Fed. 828, 831 (C. C. A. 8th 1920).

Section 734, Title 28, *U. S. Code* under which the District Court derives its power to consolidate causes, reads as follows:

"When causes of a like nature or relative to the same question are pending before a Court of the

> United States * * * the Court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, *and may consolidate said causes when it appears reasonable to do so.*" (Italics ours.)

Judge Woolsey acting under said provision of the Judicial Code in his discretion declared if ever there was an instance where an order of consolidation would be appropriate, it was in the *Johnson* and *Brake Shoe* cases (R. 711). The two causes were in the same court; all the parties to the *Brake Shoe* case were before him as defendants in the *Johnson* case; the causes were of a like nature and related to the same questions; both cases had a similar objective. It is not essential that the relief be identical in both causes. Under the language of the statute, a Judge may consolidate "when it appears reasonable to do so."

The case of *Adler* v. *Seaman*, 266 Fed. 828, upon which the respondents herein relied in their brief in the Circuit Court of Appeals is not applicable to the case at bar. In that case, at the time of consolidation, Seaman, a preferred stockholder of United Railways Company, filed a bill charging waste and maladministration by certain directors of the company, and seeking recovery of the assets so wasted and the removal of the directors. Issue having been joined, complainant moved for a receiver and an order was made appointing a Master to take testimony and report upon the advisability of such receivership. Thereafter, and before a report was made by such Master, one Adler, a bondholder of the company filed a bill against said company asking for a receiver, and the defendant having answered, admitting all of the allegations of the bill, a receiver was appointed in the *Adler* suit who took

immediate possession of the property. Thereupon Seaman made a motion asking that the two causes be consolidated and that the *Adler* suit be treated as an intervention in the *Seaman* case. This motion was granted and an order was entered allowing the consolidation of the two suits and ordering that the *Adler* suit be considered an intervention in the *Seaman* suit. This was held to be error. The reason given was not that the consolidation was not proper, but because that part of the consolidation order which made the *Adler* suit ancillary to the *Seaman* over the vigorous protest of the parties to the *Adler* suit, was erroneous. The Court said at page 838:

> "We know of no instance of an order forcing a pure intervention by unwilling parties, and we think that such an order cannot be made."

In the case at bar, no intervention was created by the "Consolidation Order", but each of the two causes consolidated by the order retained its full force and virtue as an independent cause.

It was not only "reasonable" in the language of Section 734 of Title 28 of the United States Code to consolidate said causes, but such consolidation avoids the unnecessary costs resulting from the trial of two causes separately.

> *MacGregor* v. *Johnson, etc., Inc.*, 31 Fed. (2d) 270 (C. C. A., 2nd).

The fact that Judge Woolsey ordered such a consolidation without request or motion by the *Johnson* complainant is not "unreasonable" within the meaning of the statute. The word "reasonable" used in the connection in which it is employed relates to the question as to whether there are sound reasons for ordering the consolidation, and not at whose instance the Judge acted.

Moreover, it can properly be said that the prayer for consolidation was included in the concluding general prayer of the *Johnson* bill for "such other and further relief as to the Court may seem just and equitable in the premises" (said by Judge Woolsey to be second only in its comprehensive scope to the Lord's Prayer), and was a direct request to the court to use such means of accomplishing the other prayers of the bill as the court may deem just and proper.

See

The Gazelle and Cargo, 128 U. S. 474, and cases cited herein.

CONCLUSION.

The decree of the Circuit Court of Appeals should be reversed, and the orders of Judge John M. Woolsey affirmed.

Respectfully submitted,

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April, 1933.

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CHARLES ELMORE

Nos. 711 and 721

Supreme Court of the United States

OCTOBER TERM—1932.

BENJAMIN F. JOHNSON,
Petitioner,

against

MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,

against

INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
of the
INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

REPLY BRIEF OF PETITIONER-INTERVENOR, LILLIAN BOEHM, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ELLIOT S. BENEDICT,
Counsel for Petitioner-Intervenor,
Lillian Boehm.

LOUIS BOEHM,
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DAVID RASCH,
of Counsel.

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Section 27, Title 28, U. S. Code..... 5, 7

IN THE

Supreme Court of the United States

NOS. 711 AND 721.

BENJAMIN F. JOHNSON,
Petitioner,
against
MANHATTAN RAILWAY COMPANY, *et al.*,
Respondents.

THE AMERICAN BRAKE SHOE AND FOUNDRY COMPANY,
Respondent,
against
INTERBOROUGH RAPID TRANSIT COMPANY,
Respondent.

IN THE MATTER
of
THE INTERBOROUGH-MANHATTAN RECEIVERSHIP PROCEEDINGS.

REPLY BRIEF OF PETITIONER-INTERVENOR, LILLIAN BOEHM, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Mention is made in the Receivers' brief (p. 6), of the filing of the petition herein on February 17th, 1933, after entry of the final order for mandate on December 29th, 1932. This delay is attributable largely to the non-cooperation and ob-

struction of the Interborough Receivers' counsel. The filing of eleven copies of the voluminous record herein was required to effect this application. Counsel for the Interborough Receivers had in their possession approximately 150 copies of the record in the Court below, printed at the expense of the receivership estate for possible use in this Court. Petitioners' attempt to borrow copies met with refusal. It was later ascertained that the Clerk of the Circuit Court of Appeals had sufficient copies on file which could be utilized for this application. Petitioners requested him to forward these records to this Court. When word of this reached Receivers' counsel, they interposed objections before the Clerk to such use of these records on file, claiming that they were the property of the receivers, and not of the Court, and could not be put to such use without their consent. Petitioners, after further delay, finally persuaded the Clerk, nonetheless, to send these records to this Court for use upon this application.

No prejudice, however, has resulted to the Receivers from the delay in making this application for certiorari, since it appears from their own note appended to their brief (p. 22), that the last important action in the receivership administration took place on December 29th, 1932, the same day on which the final order for mandate was entered herein, and that nothing of consequence has been done since.

Counsel observe that since Judge WOOLSEY's decision, the receivers have proceeded with the administration of the receivership, thus materially altering the situation and making impossible the restoration of the original *status quo*. While we claim that the orders of their appointment, and all acts done by them thereunder, are void, we have no desire or intention to question any proper

acts of the receivers done in connection with the care and management of the receivership estate, or to surcharge them therefor. No such purpose motivates this application.

Replying to Receivers' Point One.

Counsel assert that, assuming the Division of Business order is invalid, the Designation Order was unaffected thereby, and under this order Judge MANTON had power to appoint receivers. The Designation Order, however, merely empowered Judge MANTON to hold a District Court; when he entered the District Court he became bound by Rule 11a. His Designation Order gave him no greater power in the District Court than that enjoyed by the regularly appointed District Judges. Like all the other District Judges, he had no authority or jurisdiction to hear applications for the appointment of receivers unless assigned to the Motion Part, pursuant to Rule 11a. The Designation Order and the Division of Business order were dependent upon one another. If the first order was invalid, there could be no disagreement between Judge MANTON and the District Judges, upon which to found the Division of Business Order. On the other hand, if the second order was invalid, the designation order gave him no power to hear applications for receivers, for once in the District Court, he was bound by Rules 1a and 11a.

Replying to Receivers' Point Two.

The fact that Judge WOOLSEY refused to examine into the propriety of the Designation Order, and that the petitioners took no appeal from that

part of his order, does not foreclose the question from review by this Court, as counsel contend. If the Designation Order was void, it required no order to establish its invalidity. This could be shown at any time when acts done under it were brought under review. The designation order is of itself innocuous; its validity is of no moment until some definitive action (i. e., appointment of receivers) is taken under it. In considering the validity of such action, the invalidity of the Designation Order may then be shown.

Counsel erroneously assert that this Court is asked to determine the question of the existence in fact of public interest justifying the designation, upon mere *ex parte* assertions of its nonexistence made in a collateral suit. In the first place, these are not the *ex parte* assertions of the petitioners, but the assertion of none other than Judge MANTON himself, whose order is here attacked. They were made not in a collateral suit, but in the *Brake Shoe* case, the very case for which the designation was made. Both in Judge MANTON's opinion, and in Mr. Quackenbush's affidavit referred to therein, the sole public interest asserted was the unfounded fear that a trust company might be appointed receiver, which was not public interest at all.

In the Court below, we urged that public interest in fact must exist to justify the designation by the Senior Circuit Judge of a Circuit Judge to hold a District Court, under Sec. 22, Tit. 28, U. S. Code. In support, we pointed out that while Sec. 22 originally provided for designations if *in the judgment of* the designating judge the public interest required such designation, in like form as Secs. 17, 20, and 21, Tit. 28 (providing for designations of District Judges), Sec. 22 was

recast in 1922 so as to omit the words "whenever in the judgment of the Senior Circuit Judge," whereas the same provision in Secs. 17, 20 and 21 was continued unchanged. Judge HAND, though recognizing this legislative change, expressed doubt that it was intended to have the result of subjecting to scrutiny the designation of a Circuit Judge, and not the designation of a District Judge. The legislative change in this Section is clear. If the result be deemed undesirable or unsatisfactory, the remedy lies with Congress to correct this enactment, and it is *not for the courts to re-legislate into the Act the provision thus expressly omitted.*

It is said that designations have been made in the past for the trial of particular cases. In those instances, however, the District Courts to which designations were made had no rules similar to rule 1a and 11a. Those designations therefore have no application here. Furthermore it does not appear that any objection to these designations was made, or their propriety ever questioned, in the cited instances. In *U. S.* v. *Gill*, 292 Fed. 136, cited, a Circuit Judge was designated to hear a particular case, but there the District Judge sitting was disqualified because of interest from hearing that particular case. Since the designation was required by the necessities of a particular case, the designation was naturally directed to the hearing of that particular case, and, upon its conclusion the public interest which required the designation ceased.

Replying to Receivers' Point Three.

Authority for the adoption of Rules 1a and 11a is found not only in Sec. 731, Tit. 28, U. S. Code, but also in Sec. 27, Tit. 28, U. S. Code, and in

the inherent right and power of the District Courts to regulate and control their business.

These rules are not inconsistent with Sec. 13, Tit. 28, U. S. Code. Under these rules, the District Court, as a court of equity, remains open, but provision is made for the handling of the business specified in Sec. 13 by assignment of a particular judge of the Court. No proof was shown that at any time the judge holding the Motion Part was unavailable to any applicant for the appointment of a receiver. There is no inherent right in litigants to have the opportunity to apply to more than one judge of a particular court. Under Rule 11a, applicants for the appointment of a receiver are in no worse situation than are the litigants in two-thirds of all the districts in the country where there is only one district judge. The power given to any district judge by Section 13, to make certain orders, is expressly limited by the clause "according to the rules and practice of the court." The section merely grants *general* power, but the *exercise* of that power is limited by the rules and practice of the court. Any other interpretation would give rise to disputes among judges, conflicts of jurisdiction, and chaos.

These Rules are entirely consistent, as well, with Secs. 22 and 23, Tit. 28, U. S. Code. After a Circuit Judge is assigned to hold a District Court, he becomes subject to the rules of that court, and must transact such business as may be assigned to him under those rules. Once so designated, he becomes subject to the same obligations, duties, and restrictions to which any other District Judge is subject. He has no rights or powers superior to those of the other judges. The fact that he is the Circuit Judge, confers

upon him no standing superior to that of any of the numerous District Judges, who, from time to time, are assigned to hold a District Court within this District. The provision of the statute that a Circuit Judge, if assigned to the District Court, shall possess the powers and rights and perform the duties of a District Judge, does not mean that he has inherent right to perform any *particular* kind or class of business, or to hear any *particular cases*. It merely means that as to such judicial business as he transacts, he shall have the powers and perform the duties of a District Judge.

In *Ford* v. *Clarke*, 204 App. Div. 5 (affd. 236 N. Y. 606), all of respondent's contentions that Court Rules as to the assignment of business curtail the powers of a judge and prevent him from performing the duties of his office, were presented and rejected.

Rules 1a and 11a, for the same reasons already given, are not inconsistent with Secs. 17 and 18, Tit. 28, U. S. Code, relating to the designation of a district judge of another district when required by disability, necessary absence, or accumulation of business.

These rules do not conflict with Federal Equity Rule 6, providing for establishment of time and place for hearing of motions on notice. This rule has reference to districts having but one judge. Where there are several judges in the district, Sec. 27, Tit. 28, U. S. Code, authorizing the division of business, controls, and *the* judge assigned to hold the motion part, not *any* judge, is the judge referred to in Rule 6.

Respondents contend finally that Rule 11a is an equity rule, lacking the concurrence of a majority of the Circuit Judges, required by Federal

Equity Rule 79. There is nothing in the record however to show such lack of concurrence. We maintain furthermore that it is not an equity rule, but a general practice rule, regulating practice in applications for appointment of receivers not only in equity, but in bankruptcy and other causes. As Judge WOOLSEY said of Rule 11a, "It simply points to the door of the room where applications for receiverships must be made" (R. 714).

Replying to Receivers' Point Four.

Counsel urge that petitioners' remedy was to appear on the return of the rule *nisi* in the *Brake Shoe* case before Judge MANTON, and there challenge his jurisdiction or oppose continuance of the receivership, and if unsuccessful, to appeal.

We were not, however, required to pursue that course. Our contention is that the Designation and Division of Business Orders are void, and that Rules 1a and 11a are mandatory, so that Judge MANTON's assumption of jurisdiction and appointment of receivers were *coram non judice*, and therefore subject to attack by independent bill at any time.

Nor was the suggested course open to the petitioners. *The right to specially appear in an action is limited to those named as parties therein.* Strangers to litigation have no standing to appear generally or specially therein. The petitioners were strangers to the *Brake Shoe* case, and could become parties only by intervention. Intervention imposed subordination to, and recognition of, the propriety of the main proceeding, which would defeat at the outset any challenge to jurisdiction. *The "main" proceeding implied*

not merely the relief sought as stated by Judge HAND (R. 1033) *but included as well the propriety of all that had transpired before the intervention; it necessarily included the assumption of jurisdiction by Judge* MANTON *and his appointment of receivers,* whom the petitioners claim were "friendly" to Interborough and its counsel, and not impartial to the interests of all concerned as they should be (R. 24-26, 70-75, 105). These were the very subjects of petitioners' attack, and the basis of their objection to the proceeding.

Of the cases cited as authorities (p. 16), it will be noted that in the *Pacific Northwest Packing* case, the attack upon the receivership was made by a party to the action; in the *Mitchell* case, it was made by one brought into the action by service of process; and in the other two cases, the standing of the litigant and his right to question the propriety of the receivership in the proceeding were not raised or adjudicated.

In stating at page 16, that Mr. Boehm and Mr. Franklin appeared before Judge MANTON on September 6, 1932, counsel failed to mention that this was in an entirely separate action, *Barber* v. *Manhattan Ry. Co.*, and not the *Brake Shoe* case.

Replying to Receivers' Point Five.

The facts supporting the charge that the proceeding for appointment of receivers was a collusive one to obtain friendly receivers, were before the Courts below (R. 70, 72, 74, 75, 24, 25, 26).

The point was raised directly in the brief of Johnson's counsel upon the appeal in the Court below (Point XVI, pp. 53-57).

Whether or not this point was discussed in the Court's opinion below, it has been properly raised, and is properly before this Court for determination.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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